Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

KARL M. LEE,

Petitioner,

v.

ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 14, 2001

7768

I
QUESTIONS PRESENTED

- As a result of petitioner's illegal arrest, petitioner and his family witnessed a multi-case pattern of unconstitutional activity and evidence linking conduct with policy/custom of denying citizens of their equal protection of the laws, and deprivation of Due Course of Justice. Petitioner and his family attempted to resolve these injustices by filing reports and various communications directed to the State Government, (i.e. California Attorney General, Internal Affairs, LA. Sheriffs various Department heads of local government and the California Court System, etc.). There is substantial evidence of corruption and the denial of access to justice as petitioner and his family frustratingly and fruitlessly sought to bring out the truth so that petitioner might obtain a "fair hearing" and bring to light the process that "usurps" citizen's rights. Subsequently, petitioner filed a Title 28 U.S.C. § 2254 that was dismissed by the District Court and petitioner then appealed to the 9th Circuit.

1.) Question number one is whether the court below erred in denying Ground *One* of petitioner's instant petition for writ of habeas corpus, which petitioner contends he was denied effective assistance of counsel at a very critical stage of the criminal process which violated his Sixth Amendment right of the U.S. Constitution were petitioner was arrested without a warrant in his home and was brought before a Commissioner in a Municipal Court, and charged with two (2) felony counts. Petitioner requested the Public Defender and the court stated: "You do have a Public Defender" but the Public Defender failed to appear at the Arraignment to represent his client.

2.) Question number two is whether the court below erred in denying Ground *two* of petitioner's instant petition for writ of habeas corpus, which petitioner contends his

II

Fourth Amendment right to the U.S. Constitution was violated due to the absence of exigent circumstances. The Fourth Amendment does prohibit an arrest made during a warrantless entry within a person's dwelling.

3.) Question number three is whether the court below erred in denying Ground *four* of petitioner's instant petition for writ of habeas corpus, which petitioner contends his Fourteenth Amendment right to Due Process was violated due to the Courts failure to rule upon defendant's 1538.5 Suppression Hearing, the Right to an Impartial Judge. In the case at hand, the court states that it is not going to make a ruling as to the validity of the arrest; yet, counsel for the defendant had requested the arrest itself be declared illegal.

4.) Question number four is whether the court below erred in denying Ground *five* of petitioner's instant petition for writ of habeas corpus, which petitioner contends his Fourteenth Amendment right to the U.S. Constitution, Due Process was violated as to the Insufficiency of Evidence to support the State conviction, and was denied the Right to Prosecutorial Fairness. In the case at hand, the prosecution presented evidence during the trial of the testimony of the alleged victim that she in fact called the emergency "911" telephone number from a location near her residence after the defendant had allegedly removed the telephone from the residence in which both the defendant and the alleged victim were residing. The people presented a corroborating witness, a neighbor who testified that the call made to the emergency "911" telephone number was made from the neighbor's telephone. Pursuant to discovery the people had previously provided the defense with a printout of the call made to the emergency "911" telephone number showing that the origin of the call was made from the residence telephone number of the alleged victim and the defendant.

III

5.) Question number five is whether the court below erred in denying Ground *six* of petitioner's instant petition for writ of habeas corpus, which petitioner contends his Sixth and Fourteenth Amendment to the U.S. Constitution was violated due to Ineffective Assistance of Counsel, and was denied the Right to an Impartial Judge. The trial attorney had postponed the trial for almost one year due to his serious illness. Also during the trial, attorney Smith complained of great pain to the trial court, which the court ignored.

6.) Question number six is whether the court below erred in denying Ground *seven* of petitioner's instant petition for writ of habeas corpus, which petitioner contends his Sixth Amendment right to the U.S. Constitution was violated due to ineffective assistance of counsel. Counsel for the defendant failed to disclose the identity of an alibi witness, defendant's father, who would testify that the defendant was present with him during the time of the alleged offense. Petitioner informed defense counsel and the prosecutor before trial via a *Usurpation Report*. Defense counsel had provided the prosecutor with the identity of the father as a "possible" witness but had not identified the father as a potential "alibi" witness.

7.) Question number seven is whether the court below erred in denying Ground *eight* of petitioner's instant petition for writ of habeas corpus, which petitioner contends that the Court's failure to allow the defense to present a previously disclosed witness as an "Alibi" witness constitutes an abuse of discretion which substantially denies the defendant the Right to a Fair Trial and Due Process of Law. The court upon denying the defendant counsel's motion at [side bar] to present defendant's father as a potential defense "alibi" witness which substantially affects the outcome of the case.

8.) Question number eight is whether the court below erred in denying Ground *nine* of petitioner's instant petition for writ of habeas corpus, which petitioner contends that the Court Erred when it Failed to permit the Defense Cross Examination of witnesses and failed to permit a brief continuance during trial to present "Documentary Evidence" thus denying his right to Due Process and a fair trial. The prosecutor requested a social service worker to testify that the alleged victim was found to be developmentally disabled and qualifies for the service of his agency. The court permitted the testimony of the social service worker but denied the defense's request to recall the alleged victim to cross examine her on the issue of her competency. Yet the court was presented with the Department of Children's and Family Services (Judicial Review Hearing Report). In an incamera inspection of the D.C.S. document the trial court reviewed the D.C.S. document and was challenged by defense that there was no corroborating documentation that the alleged victim was developmentally disabled but in fact the D.C.S. document confirmed defense counsel's argument that the alleged victim was convicted of mutilating her three children from previous relationships and had a drug and alcohol problem. Further, the court denied the defense's request to recall the alleged victim and thereby denied the defendant's presentation of his case by not permitting his counsel to directly rebut the competency issues raised.

9.) Question number nine is whether the court below erred in denying Ground *ten* of petitioner's instant petition for writ of habeas corpus, which petitioner contends that the Court Erred by permitting a Social Worker to Testify that the Alleged Victim was Developmentally Disabled, when in fact their agency Documents Stated Drug, and Alcohol Abuse, the Court allowed the testimony without proper Expert Foundation being presented during the course of testimony, thus denying petitioner's right to Due Process and a fair trial.

10.) Question number ten is whether the court below erred in denying Ground *eleven* of petitioner's instant petition for writ of habeas corpus, which petitioner contends that the Court's failure to properly advise the defendant of his rights to a speedy trial based upon an inappropriate justification for continuance constitutes prejudicial error. The case was called for trial on Monday, April 27, 1997 as day seven (7) of ten (10) on the trial calendar. The court informed the defendant that his attorney had called the court and requested a trailing of the matter to Monday of the next week, which would be beyond the ten-day trailing period. There was no indication on the record why the attorney had requested the continuance. The defendant requested his attorney to be present. The matter was continued for his attorney's presence until 1:30 p.m. of the same date. At 1:30 p.m. the court does not inform the defendant on the record that his last day for trial would be Thursday, April 24, 1997. The court does not indicate to the defendant that he has an absolute right to start his case no later than April 24, 1997. The court then states a Time Waiver setting the trial to April 28, 1997 as the last day of the ten days. The court had previously indicated on the record that the courtroom would not be available Thursday and Friday of the week of April 21, 1997 due to cosmetic repairs. The defendant ascertains independently that the courtroom was, in fact, conducting business, and was available. The defendant did not enter into a knowingly and intelligent waiver of his Speedy Trial Rights. In fact, the court knew that its own courtroom would be available on April 24, 1997. The trial court did in fact lie and mislead the defendant with the rationale that the courtroom would be unavailable due to repairs.

11.) Question number eleven is whether the court below erred in denying issues of public concern that petitioner presented in the instant petition for writ of habeas corpus.

VI
PARTIES TO THE PROCEEDING

The petitioner in this case is Karl M. Lee.

The respondent is the Attorney General of the State of California.

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IN THE
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Karl M. Lee, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 24, 2001.

OPINIONS BELOW

The September 24, 2001 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, case No.01-55913 and unpublished is reprinted in the separate Appendix to this petition, pp 1a. The prior opinion of the United States District Court for the Central District of California-Western District, case No. CV 99-10046 is unpublished and is reprinted in the separate Appendix to this petition, pp 2a-32a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Title 28 U.S.C. § 2254(a). State custody; remedies in Federal courts:

(a) The Supreme Court, a Justice thereof, a Circuit judge, or a District Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This case began on the night of June 8, 1996, at 10:45 PM, Petitioner Lee was arrested in his home (without a Search and Seizure Warrant) and charged with a *273.5(a) Felony* and "not" read his "Miranda Rights". Petitioner was arraigned by a Commissioner, which he did not elect, on June 11, 1996 in Div. II, Municipal Court of the Santa Anita Judicial District, County of Los Angeles. Petitioner requested a Public Defender and request was granted. The Public Defender failed to represent his client at the arraignment, nor was he present in the courtroom, to represent the citizens shackled to Petitioner. Petitioner and family attended [all] court proceedings and took notes being

mindful of the manner in which the Deputy District Attorneys' mishandled the exculpatory evidence given to them by Petitioner's parents before the arraignment. On or about September 12, 1996 Petitioner mailed the "*Usurpation Report*" detailing what Petitioner and his Family witnessed during arraignment proceedings. These details linking conduct with *policy/custom*, of denying citizens their "*Due Course of Justice*". We felt it was our duty to inform the State of these Constitutional violations *in a timely manner*". We quickly informed the Internal Affairs Bureau, Sheriff Sherman Block, District Attorney Gil Garcetti, Mayor Richard Riordan and Attorney General Dan Lungren, detailing the "*Discovered Peril*". Other correspondence detailing these issues were sent again to the above via Certified Mail. On May 2, 1997 Petitioner was found guilty of two (2) Felony Counts of 273.5(a).

REASONS FOR GRANTING THE WRIT

Question 1. Claim (1)

Statements from the Report and Recommendation. (App. 11a-15). The District Court states "It is not clear that the arraignment constituted a critical stage in Petitioner's trial . . ." The District Courts ambiguity on this issue is apparent since they failed to consider Petitioner's evidence at the arraignment, specifically, the Trial Court Record. The District Court further states, "under California law, the purpose of an arraignment . . . is to inform the accused of the charge against him and to give him fairly the opportunity to plead to it."

1.) The District Court has claimed that Petitioner was read his accusatory pleading. The District court erred on this issue by not reviewing Petitioner's evidence that clearly stated Petitioner was charged with a two (2) felony counts of Penal Code § 273,5(a), however the trial court docket stated misdemeanor and the complaint read felony. On June 11, 1996 at Petitioner's arraignment he was not given a copy of the complaint.

2.) On June 17, 1996 Petitioner was handed a copy of his Complaint by an unknown Public Defender. It should be

noted that on the Clerk's Original Docket its states: *"Defendant present without Counsel"* and then [confirms] the Public Defender was present! The unidentified Public Defender presents copy of Complaint, [moves] the Court for a "Time Waver". However, the Petitioner received a copy of his Complaint six (6) days after his Arraignment (Clerk's ledger states Defendant present without Counsel, yet clerk recorded Public Defender present). Wherein this conflicts with the very entries on this docket! Petitioner, on that day received in Court, a copy of an unsigned Complaint. The Declarant's, Dep. D. Wibert and Kathleen Gentry, Deputy should have signed the unsigned Complaint. Had Petitioner been represented by a Public Defender, (at his arraignment) counsel would have reviewed the trial court record and the complaint against Petitioner recognizing, that the defendant was charged with two (2) felony counts of *273.5(a)* although the court records indicated that he was charged with two (2) misdemeanor counts.

4.) A misdemeanor domestic violence offense is defined in *Cal. Penal Code* § 1000.6 (b),(e). The defendant will always be in the superior court if the defendant is arraigned on an information since an information is filed only if a felony is charged. (See: *Cal. Penal Code* § 949).

5.) The District court stated: Therefore, other than pleading to the charges against him, a defendant in California state court does not necessarily face other critical decisions which could affect the remainder of his criminal proceedings."

6.) The District Court erred in its factual and legal analysis of this issue. Petitioner was faced with critical decisions, which affected the remainder of his criminal proceedings. Petitioner argues that since he was tried with two (2) felony charges, (in a Municipal Court) and not a Superior Court (*Cal. Penal Code* § 949), he was not afforded his due process rights, (i.e. the defendant was not afforded a Superior Court felony trial and a felony appeal to the California Court of Appeal 5th Circuit). If right of appeal is granted by statute, due process and equal protection clauses

of *Fourteenth Amendment* [demand] that procedures afforded are fair and adequate. *Myers v. Collins*, (C.A.5 Tex. 1993) 8 F.3d 249, appeal after remand 76 F.3rd 1330. A criminal defendant in California has a constitutional right to effective counsel at trial. *U.S. Const. Amends*, VI,XIV; *Cal Const.* Art. I, § 15; *Penal Code* §§ 686, 686.1 (capital cases), 1138; *Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343, 83 S.Ct. 792 , 9 L. Ed 2d 799.

Questions 2 & 3. *Claims (2 & 4)*

In reviewing the District Court's Recommendation on Claims (2 & 4) the court gives no analysis in how they reached their decision in determining the facts of the case that Petitioner received a fair and full review of his *Fourth Amendment* Claims. (App. 16a)

1.) Generally, a valid arrest must be made pursuant to an arrest warrant. However, if made other than within a residence, a warrant less arrest or an arrest pursuant to an invalid warrant may also be valid if it is supported by probable cause. However, in the absence of exigent circumstances the Fourth Amendment does prohibit an arrest made during a warrantless entry within a person's dwelling.

2.) On April 28, 1997 the defendant, through his attorney of record, brings a *1538.5 motion* requesting the suppression of any and all evidence arising out of the illegal search and seizure of the defendant. Items sought to be suppressed include any and all statements made by the defendant and the facts arising out of the arrest including, but not limited to, the arrest itself. An arrest is an action which has constitutional impact. First, an arrest is a "seizure" of the person, in the constitutional sense. See: *People v. Ramey* (1976) 16 Cal. 3d 263, 275, 127 Cal. Rptr. 629, 545 P.2d 1333, cert denied. 429 U.S. 929 (1976); *People v. Superior Court (Kenner)* (1977 73 Cal. App. 3d 65, 139 Cal Rptr. 343 (valid consent to enter to make arrest given in one of two consolidated cases). It is governed, therefore, by the search and seizure standards of the *Fourth Amendment* and the California Constitution. See: *U.S. Const. Amend.* IV and *Cal. Const. Art.* I. § 13.

3.) In the case at hand, the Court states that it is not going to make a ruling as to the validity of the arrest: (1538.5 Tr. 79).

> The Court: "Also, I think what we're hearing now from the two witnesses that when Mr. Lee opened the door, if he was visible from 30 feet to be naked, that was more than the one inch Mr. Lee testified to so I am going to find that this motion is inappropriate, there being no evidence that needs to be suppressed, there being no statements, no property seized on the date of the arrest. I'm going to make no ruling on the validity of the arrest at this time."

Yet, counsel for the defendant had requested: (1538.5 Tr. 77).

> Mr. Smith: "We would request the arrest itself be declared illegal."

The question presented is whether the issue of the illegality of the arrest should be ruled upon by the Court prior to the start of the trial and what are the appropriate remedies arising out of the illegal arrest?

4.) Counsel for the defendant has squarely stated his grounds for his 1538.5 motion and has in doing so placed the *burden of proof upon the prosecutor*. When the property of a search conducted without a warrant is challenged, the burden is on the prosecutor to establish justification under a recognized exception to the warrant less requirement or the burden must be discharged by a preponderance of the evidence. See: *People v. James* (1977) 19 Cal.3d 99, 106, 137 Cal. Rptr. 447, 561.

5.) In the case at hand, when the court fails to rule upon the motion, the court in effect denies the defendant his opportunity for due process by eliminating the requirement for the prosecutor to establish justification under a recognized exception to the warrant requirement. The defense has an opportunity to request that after hearing this motion the court use its power and jurisdiction granted under *Penal Code Section* 1385 (a) to dismiss the case. The

dismissal is valid only if ordered at the time the court makes a ruling on the search and seizure motion.

6.) Presumptively, since the seizure of the person is constitutionally protected, the subsequent presence of the defendant in court could be the subject of a suppression motion. For example, if the court finds that the arrest of the defendant was in fact illegal, can the people ask for the victim to identify the defendant in court pursuant to the illegal arrest of the defendant? In other words, the presence of the defendant in court could be suppressed.

7.) Issues in this case include the facts supporting the prosecutor's theory of arrest the entry by the officers was in fact a "consensual entry" under an implied consent theory. See also *United States v. Shaibu* (9th Ctr. 1990) 895 F.2d 1291, 1294, opinion amended by 912 F.2d 1193 (9th Ctr. 1990), the court held there was no implied consent when the defendant merely left the door open and did not object when the police walked into the premises. In the case at hand, there is no testimony from the officers that consent to enter was requested. The arresting officer states as follows: (1538.5 Tr.9-10).

> Q: "Was the defendant wearing anything when he answered the door?
>
> A: No, he was naked.
>
> Q: What did you say to the defendant?
>
> A: I asked him if he was Karl Lee. He said "yes", I asked him to put on some clothes and step outside and talk to me.
>
> Q: What was his response?
>
> A: He turned around, walked back in the trailer.
>
> Q: What did you do at that point?
>
> A: I took that as implied consent and walked into the trailer. Also for my safety, I wanted to see where he was going. Was he going to get dressed, arm himself possibly. I didn't know".

Also, there is no indication from the 1538.5 transcript that a truly exigent circumstance existed requiring the warrantless

arrest of the naked defendant in his home. The offense allegedly occurred on June 4 and 6, 1996 and the arrest itself took place two days later on June 8, 1996. There was more than adequate time available to secure a warrant based upon probable cause. In fact, Officer Craig Johnson, indicates that he was requested by Officer Daly to go to the trailer park and arrest the defendant, Karl Lee, as a named suspect in a 273.5 report that was taken. The Deputy states as follows: (1538.5 Tr.6-7).

> Q: What, if anything, did Deputy Daly ask you to do?
>
> A: She asked me to go to the trailer park, see if Karl Lee was there and if so arrest him as a named suspect in a 273.5 report that was taken.
>
> Q: Did she provide you with a copy of that police report?
>
> A: Yes."

The police report was admitted into evidence. Counsel for the defendant inquires from the officer whether his opinion that a felony had been committed by the defendant was based on reading the report when the report itself indicated that the reporting officer does not classify the offense as a felony. Yet, upon *cross* examination the officer states as follows:

> Q: "You would agree that Officer Daly did not classify it as a felony in her opinion?
>
> A: We arrest for spousal assault under a felony.
>
> Q: No matter what?
>
> A: It's been my experience, yes.
>
> Q: Even when the individual is not there?
>
> A: I'm sorry?
>
> Q: Even when the individual is not present at the scene to be arrested at the time of the incident?
>
> A: Yes, sir".

Thus, the officer's testimony implies that a 273.5 arrest is a "defacto" felony when it is the officer's obligation to determine whether or not a felony has in fact been committed. This is hardly sufficient to establish probable

cause for a warrant less arrest of the defendant at his residence. The District Court implies that the Petitioner was provided an opportunity for full and fair litigation of a *Fourth Amendment* claim. The Trial Court never ruled on the issue and the California Supreme Court *denied without specificity* on the issue. How does this Court infer that Petitioner was given a full and fair litigation of a Fourth Amendment claim?

Question 4. *Claim (5)*

The District Court has erred by not ruling on "Motion to Correct Clerical Mistakes and Judgment" filed on September 26, 2000. Had this Court addressed these issues in the motion it would be obvious that Officer Daly's testimony was misleading and irrelevant to the jury. (App.16a-18).

1.) On the night of June 6, 1996, at 2230 hours, Deputy M. Daly wrote a Complaint Report taken from the alleged victim. The first page, bottom line on the report where Daly marks the box provided that [no] arrest review submitted. This clearly shows the report was a [complaint] only and no arrest was to be initiated.

2.) On the night of June 8,1996 on or about 10:45 PM, Deputy C. Johnson and W/C Lt. Lindsey illegally arrested Petitioner at his home, without a Warrant. (Deputy C. Johnson and W/C Lt. Lindsey's Complaint/Arrest Report).

a). The District Court is in error when it implies that there is only one complaint report taken. Officer Daly's was the first, June 6th. the [second] report was written by C. Johnson and Lt. W/C Lindsey the arresting officers on June 8th.

b). *The Testifying Officer Did Not Meet The Requirements of Penal Code Section 872 (b).* In *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160, the Court held that *Penal Code Section* 872 (b), part of *Proposition* 115, permits a properly qualified investigating officer to relate out-of-court statements by crime victims or witnesses, including other law enforcement personnel, without requiring the victims or witnesses to be present in court. It does not

authorize a finding of probable cause based only on the testimony of a non-investigating officer or "reader" who recites the report of an investigating officer. The testifying officer "must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." Clearly there are [two] different complaint reports taken on two different nights by the investigating Officer Daly and by the non-investigating officers, C. Johnson and Lt. W/C Lindsey.

c). *There Was No Probable Cause To Detain The Defendant*. A police officer may only detain a citizen if the police officer possesses: specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain in that activity. [This suspicion] must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience ..., to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigating stop or detention predicated on mere curiosity, rumor or hunch is unlawful, even though the officer may be acting in complete good faith. *In re Tony C.*(1978) 21 C3d 888,893, 148 CR 366 (emphasis added); see *Graham v Connor* (1989) 490 US 386, 397, 104 L.Ed 2d 443, 456, 109 S CT 1865.) (Some language has been deleted from the quotation because reasonable suspicion is no longer measured by a particular officer's subjective state of mind at the time of stop or detention.)

d). The above arguments clearly define the law on this issue and show the importance of correcting the lower Courts assumption that it was [c]lear in reviewing the record. The District Court never recognized that (two) reports were written, (the first by the investigating Officer Daly and the second by the non-investigating officers C. Johnson and Lt. W/C Lindsey), It was the second report by officers C.

Johnson and Lt. W/C Lindsey that Petitioner alleges is the False Report taken on the night of June 8, 1996. Deputy Johnson failed to document on his report, that his watch commander accompanied him as they did not log in on the night of Petitioner's arrest. Deputy Johnson made other false statements on his report that were never investigated.

3.) Had the District Court determined the issues on the 60(b) Motion they should have concurred with Petitioner that Deputy Johnson and W/C Lindsey's were the investigating and arresting officers and not Deputy Daly as Daly stated no *Arrest Review Submitted.*

Prosecutorial Misconduct (Claim 5 (a))

The District Court has erred in its evaluation of the evidence. The prosecution's introduction of possibly perjured witness testimony contradicting previously supplied evidence via tape recording and printout of the origin of the alleged victim's 911 call constitutes prosecutorial misconduct by presenting confusing and prejudicial testimony that could have materially contributed to a guilty verdict. (App.18a-21). *Petitioner asks the court to apply the authorities cited in question #8 of this document (pages 14-19) to support this claim in addition to those cited in this argument*

1.) In the case at hand, the prosecution presented evidence during the trial of the testimony of the alleged victim that she in fact called the emergency "911" telephone number from a location near her residence after the defendant had allegedly removed the telephone from the residence in which both the defendant and the alleged victim were residing. The people presented a corroborating witness, neighbor, Mr. Rodriguez, who testified that the call made to the emergency "911" telephone number on June 6, 1996 was made from the neighbor's telephone. Pursuant to *Penal Code Section* 1054, the people had previously provided the defense with a printout of the call made to the emergency "911" telephone number showing that the origin of the call was made from (818) 301-9757, the residence telephone number of the victim and the defendant. The alleged victim testified that on the night in question the defendant had removed the

telephone from the residence and left the residence. Pursuant to discovery, (Pre.Tr.39,40-43) defendant's counsel introduced the "911"tape recording as evidence playing it in court during the trial. (Tr.28,32) In the victim's own words the tape recording clearly states that she is calling from (818) 301-9757, the telephone number of the victim and defendant. The prosecution had access to the "911" call printout showing the origin of the call to be the residence of both the victim and the defendant. Yet, the prosecutor sought to present corroborating evidence through possibly perjured testimony of the neighbor which indicated that the call made to the emergency "911" telephone number was made from the neighbor's residence. No other documentary evidence of the "911" call being made at the neighbor's residence was presented to establish the veracity of the neighbor's testimony.

2.) The prosecutor had also heard in open court the playing of "911" tape which indicated that the victim stated she was calling from (818) 301-9757, the residence telephone number of the victim and the defendant. Yet, the prosecutor chose to introduce unduly and highly confusing testimony of the neighbor in which the neighbor allegedly confirmed that the 911" call was made by the victim from the neighbor's residence.

3.) Clearly, the defense was attempting to impeach the victim by showing evidence to the court. Prosecutors must disclose perjury committed by prosecutor's witness. See *Napue v. Illinois* (1959) 360, U.S. 264, wherein the conviction was reversed when the prosecutor stands silent while the state witness offers perjured testimony. (Tr.262,285).

4.) The defense attempted to show that the victim lied about the origin of the "911" telephone call and that her testimony about the defendant being present and taking the telephone out of their joint residence and leaving after allegedly striking the victim was untrue.

5.) The prosecutor, knowingly and with malice, introduced testimony of a corroborating witness, neighbor,

Mr. Rodriguez, which was in direct contradiction to a known "911" call printout and tape recording that clearly indicates the origin of the "911" telephone call made on that evening was made from the telephone number (818) 301-9757, the residence telephone number of the victim and the defendant.

6.) Because the prosecutor's role is to see justice done and not merely to win the case, the prosecutor must disclose to the court and to the defendant without request, all exculpatory evidence material to the charge on which the defendant stands trial. See *People v. Rutherford* (1975) 14 Cal.3d 399 121 Cal.Rptr. 261. See also *In re Ferguson* (1971) 5 Cal.3d 525 96 Cal.Rptr. 594. The duty to avoid misleading the court also requires the prosecutor to correct false or misleading statements. See *Giglio v. United States* (1972) 405 U.S. 150, 153; and *People v. Rutherford*, supra.

An attorney must employ only means consistent with the truth and never mislead a judge or judicial officer. See *Business & Professional Code* 6068 (d); *Cal. Rules of Professional Conduct* 7-1005 (1). See also *ABA Rule* 3.3 and *ABA DR* 7-102 (A)-5, which advise against knowingly making a false statement of fact or law and prohibit the lawyer from offering false evidence to the court.

Question 5. *Claim (6) Cal. Business and Professional Code* § 6190 :

Incapacity of Attorney, Jurisdiction. The courts of the state shall have the jurisdiction as provided in this article when an attorney engaged in the practice of law in this state has, for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility.

1.) The District Court presume without having the operative facts before it? (App.21a-23) The District Court erred by not holding an evidentiary hearing or granting

petitioner's numerous discovery requests and expand the record. To determine Attorney Smith's physical ability to perform, Petitioner and the Court must obtain medical records outlining his illness as Attorney Smith stated in open court. (See also Pretrial Transcripts.) To clarify for this Court, Attorney Smith should have referred Petitioner to a competent attorney and refunded Petitioner's Retainer Fee.

2.) Where the facts are in dispute, the federal court in habeas corpus [must] hold an evidentiary hearing. *Raines v. United States*, 423F.2d 526, 529-530 (4th Cir. 1970), *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Attorney Smith made statements in the presence of witnesses that his doctors believed attorney Smith had cancer. Attorney Smith also stated in the presence of witnesses that he was on heavy medication to suppress the pain. Attorney Smith failed to present Petitioner's crucial evidence/documents. Attorney Smith failed to present witnesses at trial that Attorney Smith had subpoenaed. See: Pretrial transcripts and clerk's ledger, to actual witnesses presented at trial.

3.) It's obvious that Attorney Smith could not have effectively handled Petitioner's case. Attorney Smith was faced with a much greater challenge than the case he had, he was faced with perhaps his own mortality, and this is understandable. The Court was well aware of Attorney Smith's true condition and frame of mind. It's not known at this time the result of Attorney Smith's medical test or his condition. If Attorney Smith would have obtained a sworn affidavit from a doctor, a continuance would have been granted from day to day. See: People v. Augustine (1968) 71 Cal. Rptr. 384, 265 C.S. 2d 317. Failing to keep client informed of status of case, engaging in prolonged inaction is reckless disregard obligation to perform legal services competently, and misrepresenting facts about status of case and action to client. Conroy v. State Bar of Cal. (1991) 280 Cal. Rptr. 100, 53 Cal. 3d 495, 808, P.2d 243.

4.) A criminal defendant in California has a constitutional right to effective counsel at trial. U.S. Const. Amends. VI,XIV; Cal Const. Art. I, § 15; Penal Code §§ 686,

686.1 (capital cases), 1138; Gideon v. Wainwright (1963) 372 U.S. 335, 342-343, 83 S.Ct. 792 , 9 L. Ed 2d 799.

Questions 6 & 7. *Claim (7 & 8)* (App.23a-28).

For the above reasons, and the fact the District Court has evidence currently lodged disputing their determination of this claim, this Court has failed to review the *Usurpation Report* which is indisputable evidence that the defense attorney and the prosecution had prior knowledge of an alibi defense. On or about September 12, 1996 Petitioner mailed the "***Usurpation Report***" detailing what Petitioner and his Family witnessed during arraignment proceedings. These details linking conduct with *policy/custom*, of denying citizens their "*Due Course of Justice*". We felt it was our duty to inform the State of these Constitutional violations *in a timely manner*". We quickly informed the Internal Affairs Bureau, Sheriff Sherman Block, District Attorney Gil Garcetti, Mayor Richard Riordan and Attorney General Dan Lungren, detailing the "*Discovered Peril*". ***(See: First Traverse, Exhibit "A" Usurpation Report)***. On October 2, 1996 Petitioner received a letter from the Attorney General Dan Lungren regarding constitutional violations. The Attorney General's response letter requesting the Petitioner to supply discovery for his investigation of Civil Rights violations. On March 17, 1997 Petitioner presented the Attorney General's request to the Municipal Court. Other correspondence detailing these issues were sent to the above via Certified Mail. The Petitioner's Defense Attorney was made aware of the alibi witness {defendant's father) at his initial consultation on or about July 22, 1996, when Petitioner retained Private Counsel, Brian J. Smith.

1.) This information was reaffirmed to the prosecution and defendant's attorney (Smith) with the presentation of the Usurpation Report on or about September 12, 1996, long before the case went to trial. See: *Ames v. Endell*, 856 F.2d 1441, 1444 (9th Cir. 1988) (counsel's duties are shaped by information provided by defendant); *United States v. Grewel*, 825 F.2d 220, 22-23 (9th Cir. 1987) (same).

2.) The lower court currently has this evidence before them. Attorney Smith was hand delivered a copy of Usurpation Report in front of percipient witnesses. Petitioner, by Certified Mail, sent the report to the Attorney General of the State of California and the District Attorney of Los Angeles County. On page 2 of the Usurpation Report, is evidence of Petitioner's alibi. The Attorney General's Office responded to the Usurpation Report. This Court can find this evidence currently lodged in Petitioner's *Traverse Exhibits*.

3.) This report clearly establishes that the Attorney Smith had prior knowledge of Petitioner's alibi. Obviously the lower Court has not spent enough time with Petitioner's exculpatory evidence. Throughout the trial Petitioner's Attorney, (Smith), led his client to believe that he had an alibi defense.

4.) Upon the presentation of defense's case, the prosecutor objected to defendants alibi witness not being disclosed in a timely manner. Over the objections of the defense attorney, the trial court judge threw out the ālibi witness thus nullifying the alibi defense. Perhaps this will clarify for this Court and explain the apparent untimely disclosure of the alibi witness. Where the facts are in dispute, the federal court in habeas corpus [must] hold an evidentiary hearing. *Raines v. United States*, 423F.2d 526, 529-530 (4th Cir. 1970), *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

Claim (8) (App.28a-29).

As explained above in claim 7, the prosecution had constructive knowledge of petitioner's alibi well before trial. An alibi defense is a critical item of evidentiary presentation, which can materially and substantially affect the outcome of any case.

1.) The court failed to properly balance the harm to the defendant against the right of the prosecutor to have adequate time to conduct discovery investigations on any potential witness. Here, the prosecutor had been given by the defense the identity of the defendant's father prior to trial.

2.) The prosecutor clearly chose not to interview the father. The defendant is prejudiced by his attorney's failure to disclose the father as a potential "alibi" witness until the trial had begun. Although it is difficult to believe that defendant's attorney could not have for seen the fact that the father could serve as an "alibi" witness in light of *Usurpation report.*

3.) In this case the prejudice to the prosecutor, if any, is clearly outweighed by the prejudice to the defendant in failing to permit the testimony.

Question 8. *Claim (9)* (App.29a-32).

The District Court has erred by omitting key elements of ground nine (9) of the Habeas Petition.

1.) Ground 9 states as follows: Petitioner contends that the Court Erred when it Failed to permit the Defense Cross Examination of Witnesses and failed to permit a brief continuance during trial to present "Documentary Evidence" thus denying his right to Due Process and a fair trial.

a) The prosecutor requested that Mr. Travis, a social service worker, testify that Ms. Gorman, the alleged victim, was found to be developmentally disabled and qualifies for the service of his agency. (Tr.243-244).

b) The trial court permitted the testimony of Mr. Travis but denied the defense's request to recall the alleged victim, Ms. Gorman, to cross-examine her on the issue of her competency. Yet the court was presented with the Department of Children's and Family Services document (D.C.S.).

c) In an [in camera] inspection of the D.C.S. document (Tr.254-255). The trial court reviewed the D.C.S. document and was challenged by defense that there was no corroborating documentation that the alleged victim Ms. Gorman, was developmentally disabled but in fact the D.C.S. document confirmed defense counsel's argument that the alleged victim was convicted of mutilating her three children from previous relationships, and she had a drug and alcohol problem ... not developmentally disabled. Therefore, the

prosecutor elicited perjured testimony to the jury regarding Ms. Gorman's condition.

d) Further, the trial court denied the defense's request to recall Ms. Gorman and thereby denied the defendant's presentation of his case by not permitting his counsel to directly rebut the competency issues raised by the "developmentally disabled" classification of the alleged victim.

e) We are guided by *Schlup v. Delo*, 115 S.Ct. 851 (1995). We are further guided by the Court's discussion in *Schlup* of its decision in *Murray v. Carrier*, 477 U.S. 478 (1986). We will assume, only for the purposes of this discussion, that Petitioner faced at least the same magnitude of "procedural obstacles" that *Schlup* faced, i.e., that he would not be able to establish "cause and prejudice" sufficient to excuse his failure to present all of his evidence in the state system. See: *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991).

f) As will be seen, we need not reach any of these difficult questions in view of the extraordinary record of this case. In *Schlup*, Justice Stevens, writing for himself and four other Justices, held that petitioners like *Schlup* and Petitioner may notwithstanding any procedural default, "obtain review of his [or her] constitutional claims only if he [or she] falls within the 'narrow class of cases...implicating a fundamental miscarriage of justice.'" *Schlup*, 115 S.Ct. At 861 (quoting *McCleskey*, 499 U.S. at 494)[1] *Id*. At 862. In *Schulp*, the

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[1] [1] In amplification of this rule, Justice Stevens wrote that: "If a petitioner such as *Schlup* presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims". As far as the quantum of evidence necessary in such cases, the Court held that: *Schlup*, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial.

Supreme Court was considering the question of what burden of proof should be imposed upon a petitioner alleging a miscarriage of justice, including a claim of actual innocence. In Sawyer v.Whitley, 112 S. Ct. 2514, 2517 (1992), the Supreme Court analyzed the miscarriage of justice exception as applied to a petitioner who claimed he was "actually innocent" of the death penalty".

g) In this penalty phase, the Court departed from the holding in Murray v. Carrier, 477 U.S. 478 (1986), and held that such habeas petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty". Sawyer, 112 S. Ct.at 2517. In *Schlup*, however, the Court abandoned the *Sawyer* (Clear and convincing" burden and instead "that *Carrier*, rather than *Sawyer*, properly strikes that balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent.)[2] In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. *(i.e. D.C.S. Report, credibility, moral turpitude and mental capacity of Gorman, and Police Report Paraza Case). Id.* at 867 [3]. Since *Schlup* was decided,

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[2] *Schlup*, 115 S. Ct.at 865. The Court went on to explain: (To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt).

[3] Of particular relevance to this case, the Court also held in *Schlup* that for a claim like Petitioner's: (To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory, scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. *Id.* at 865. In summary, therefore, the Supreme Court directed that: (It is not the district court's independent judgment as to whether reasonable

Congress adopted the AEDPA. *Section 104(4) of the AEDPA*, which amends *28 U.S.C.§ 2254(e)*, would appear to raise the Schlup burden of proof in all cases to a "clear and convincing" threshold. Writing for the Court almost half a century ago, Mr. Justice Frankfurter counseled that: (Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities, which, as Mr. Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of the people as to be ranked as fundamental, or are implicit in the concept of ordered liberty. *Rochin v. California*, 342 U.S. 165, 169 (1952), (internal quotations and citations omitted) (reversing state court conviction "obtained by methods that offend the Due Process Clause").

h) To apply Justice Frankfurter's now-famous *Roshin* locution, the States conduct in this matter is shocking in its depth. Then, Justice Rehnquist, writing for the Court twenty-one years later, predicted that ("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction.") *United States v. Russell*, 411U.S.423, 431-32 (1973). If petitioner's is not this [situation] to which Chief Justice Rehnquist referred, then there is no prosecutorial malfeasance

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doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do).

outrageous enough to bar a re-prosecution. The fact is the State rigged the proceedings in the state trial to such an extent that it was a trial in name only.

i) In addition, the misconduct of the sheriffs department, public defenders office, District Attorney's office, and the Attorney General, was not only outrageous, but also led directly to the guilty verdict. *Cf Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (prosecutorial misconduct also requires finding of prejudice to the defendant); *United States v. Bagley*, 473 U.S. 667, 684 (1985) (prosecutorial misconduct constitutes grounds for relief if the defendant shows that there was a reasonable probability that the misconduct affected the outcome of the trial).

j) Since the Supreme Court decided *Moony v. Holohan*, 294, U.S. 103 (1935), it has been firmly established that the prosecution's knowing use of perjured testimony, or of fabricated evidence, as well as its failure to take remedial measures to mitigate the damaging effects of such testimony and evidence, violate the *Fourteenth Amendment's Due Process Clause*. See, e.g., *Miller v. Pate*, 386 U.S. 1, 7 (1967) (habeas relief granted where prosecution misrepresented a pair of "bloody" shorts that were actually covered with paint); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (habeas corpus granted where conviction was obtained on perjured testimony and on suppressed favorable evidence); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (habeas relief granted where the prosecution knowingly allowed witness to testify falsely regarding his romantic relationship with victim).

2.) BRADY AND GIGLIO VIOLATIONS As will be seen from the items stated *supra*, many of them would alone constitute violations of *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (requiring disclosure of evidence regarding the credibility of the witness that may be determinative of guilt or innocence); *Napue v. Illinois*, 360 U.S. 264, 269 (1954) (non-disclosure of evidence affecting credibility constitutes

denial of due process). Under *Brady*, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Taken together these undisclosed items would not only radically have affected the defense at Petitioners trial but would, in their totality, have affected the entire truth-gathering enterprise. As under *Schlup*, 115 S.Ct. At 862, so under *Bagley* Petitioner holds by this clear and convincing evidence that our confidence in the outcome of this trial is utterly undermined by these nondisclosures.

Claim (9)(a) (App.32a-33).

The Court erred by not recognizing that the prosecution violated discovery by not presenting the transcripts of the 9-1-1 tape. This forced the defense to request the transcripts immediately, but the trial court showed bias when the Court didn't allow a continuance. The lower Court's didn't recognize that it was the intention of the prosecutor not to present all of the discovery . It is well established that this is a prosecutor's tactical advantage by not giving defense all relevant documents associated with the transfer of evidence. Although the tape recording itself was introduced into evidence, the transcript of the tape would have normally been supplied by the prosecutor as part of the discovery turned over to the defense , it was not. Therefore the jury did not review the 911 transcript during the course of its deliberation.

Question 9. *Claim (10)* (App.33a-34).

The trial court committed an error [in admitting the evidence] which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process, See: *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991), as stated by the district court, " the only question this Court may address is whether the trial court committed an error [in admitting the evidence]". The evidence is *precisely* what Petitioner [claims] violated his federal due process rights.

1.) The District Court was remiss by not considering or mentioning the alleged victim's Judicial Review Hearing Report, Superior Court No. J964515, stating that the alleged victim was a drug and alcohol abuser. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Taken together these undisclosed items would not only radically have affected the defense at Petitioners trial but would, in their totality, have affected the entire truth-gathering enterprise. As under *Schlup*, 115 S.Ct. At 862, so under *Bagley* Petitioner holds by this clear and convincing evidence that our confidence in the outcome of this trial is utterly undermined by these nondisclosures

2.) The heart of this claim is the false evidence that was presented to the trier of fact.

3.) Ground Ten states as follows: Petitioner contends that the Court Erred by permitting a Social Worker, Mr. Travis, to Testify that the Alleged Victim, Ms. Gorman, was Developmentally Disabled, when in fact their agency Documents Stated Drug, and Alcohol Abuse, the Court allowed the testimony without proper Expert Foundation being presented during the course of testimony, thus denying petitioner's right to Due Process and a fair trial.

4.) The facts indicated that the social worker, Mr. Travis, had reviewed its own internal documents, the Judicial Review Hearing Report, (Superior Court No. J964515), and had actual knowledge that the alleged victim, Ms. Gorman, was not developmentally disabled, but in fact, his own agency documents stated Ms. Gorman has a drug and alcohol problem. The social worker, Mr. Travis, had not previously evaluated the alleged victim, Ms. Gorman, but had relied on their own Superior Court Case No. J964515, which stated the alleged victim, Ms. Gorman, had been convicted of mutilating her children and has a drug and alcohol problem. The social worker's testimony contradicts his own agency's document. His testimony constitutes hearsay and was not properly introduced by presenting foundational testimony as to their authenticity, hearsay content and relevancy. The trial

court allowed the prosecutor to present evidence without proper foundation. (Tr.251-262).

5.) The documents from the DCS clearly stated that the alleged victim, Ms. Gorman was a drug and alcohol abuser and not developmentally disabled. Therefore the prosecution elicited perjured testimony.

6.) Therefore, the evidence that was given to the trier of fact was *inflammatory*, [f]alse and misleadin[g]. This has rendered the trial so arbitrary and fundamentally unfair that it violated federal due process.

7.) Since the Supreme Court decided *Moony v. Holohan*, 294, U.S. 103 (1935), it has been firmly established that the prosecution's knowing use of perjured testimony, or of fabricated evidence, as well as its failure to take remedial measures to mitigate the damaging effects of such testimony and evidence, violate the *Fourteenth Amendment's Due Process Clause*. See, e.g., *Miller v. Pate*, 386 U.S. 1, 7 (1967) (habeas relief granted where prosecution misrepresented a pair of "bloody" shorts that were actually covered with paint); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (habeas corpus granted where conviction was obtained on perjured testimony and on suppressed favorable evidence); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (habeas relief granted where the prosecution knowingly allowed witness to testify falsely regarding his romantic relationship with victim).

8.) BRADY AND GIGLIO VIOLATIONS As will be seen from the items stated *supra*, many of them would alone constitute violations of *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (requiring disclosure of evidence regarding the credibility of the witness that may be determinative of guilt or innocence); *Napue v. Illinois*, 360 U.S. 264, 269 (1954) (non-disclosure of evidence affecting credibility constitutes denial of due process). Under *Brady*, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Question 10. *Claim (11)* (App.34a-37).

The District Court has erred when making such a bold statement: "It is utterly nonsensical to think that the judge would have fabricated a story about the courtroom's repairs in order to delay the start of the trial for a week"

1.) The District Court further states that: "In any event, Petitioner has wholly failed to show any prejudice from this delay of a matter of days therefore his claim does not warrant relief."

2.) Petitioner has indisputable evidence that on Thursday, April 24, 1997, the trial court was indeed operating and conducting business. Petitioner attached to his Certificate of Appealability a Certified Copies of the Trial Court Dockets for Thursday, April 24, 1997. See: Certificate of Appealability. The Trial Court and Prosecutor were ***vulnerable***, being in day 7 of 10, and unable to produce alleged victim Gorman thus necessitating the delay to issue a body attachment for the sheriff to locate their primary witness. The case was called for trial on Monday, April 21, 1997 as day seven of ten on the trial calendar. ***See transcript proceedings of April 21, 1997, page 28, line 1 through page30, line 17.*** The court informed the defendant that his attorney requested a trailing of the matter to Monday of the next week, which would be beyond the ten-day trailing period. There was no indication on the record why the attorney for defendant had requested the continuance. The defendant requested his attorney to be present. The matter was trailed for his attorney's presence until 1:30 p.m. of the same date. At 1:30 p.m. the court does not inform the defendant on the record that his last day for trial would be Thursday, April 24, 1997. The court does not indicate to the defendant that he has an *absolute right* to start his case no later than April 24, 1997. Instead, the court states in ***transcript proceedings on April 21, 1997 on page 29, lines 15 to20*** As follows:

> The Court: "Under this present time frame of this case we have to begin your trial by Thursday of this week. I asked your counsel to ask you, Mr. Lee, if

you would agree to that. We could trail your case until Monday, April 28th. That would be the last day the case would start for trial.

Defendant: If it's convenient for you , Sir, yes.

The Court: That's what we need to do. I think it's convenient for me, it's also convenient for a jury. You don't want a jury to come in Thursday, have me swear them in, have them sit around four days, come back with nothing to do. I think that's negative for defense. That's just my opinion on it. I'm sure counsel has explained that to you. So that's what I would like to do. First, let me do that because I think that's the issue first at hand in the trial."

The court then states a time waiver setting the trial to April 28, 1997 as the last day of ten days and defendant's counsel joined in the time waiver.

3.) The court had previously indicated on the record that the courtroom would not be available Thursday of the week of April 21, 1997 due to cosmetic repairs. The defendant ascertains independently on April 24th that the courtroom was, in fact conducting business and was available. The defendant believes that the court knowingly misrepresented the availability of the courtroom on that date. Regardless, the court on taking the defendant's time waiver did not explain to the defendant his right to begin the trial on the last day, April 24,1997. Other alternatives may have been available such as moving the case to another courtroom within the facility. The defendant was misled by the explanation given by the court. The "convenience" of the court or the convenience of the jury is not the issue. This issue is whether the defendant entered into a knowingly and intelligent waiver of his speedy trial rights. In fact the court knew that its own courtroom would be available on April 24, 1997, it did in fact mislead the defendant with the rationale that the courtroom would be unavailable due to repairs. It is unclear and unknown at this time whether the scheduled repair actually was in fact delayed, thus "freeing up" the courtroom for scheduled activity on April 24, 1997, as later

discovered by the defendant. As stated Petitioner requested from the District Court, discovery, expansion of the record and an evidentiary hearing. Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing. *Raines v. Unted States*, 423F.2d 526, 529-530 (4th Cir. 1970), *Harris v. Nelson*, 394 U.S. 286, 300 (1969)

6.) As utterly nonsensical and totally incredible as it may seem, the trial court did indeed lie, mislead and showed prejudice to the defendant by stating the Court was closed for cosmetic repairs on Thursday, April 24, 1997, thus violating the defendant's right to a speedy trial.

Question 11. ISSUES OF PUBLIC CONCERN

Defacto Felonies

It should be noted that Petitioner informed the Municipal Court of the blatant discrepancies on the Complaint. (See:Habeas Corpus Exhibits "D" Pretrial Conference, page 23, lines 10-15)[5]. Petitioner and family reviewed the Record on Appeal, currently lodged in the Appellate Department , Superior Court. Upon review, we discovered that the Complaint Form had signatures unrelated to this case, i.e. Wil B. Gil for the Declarant Dep. D. Wibert and Judith Pettigrew for Kathleen Gentry, Deputy. (See: First Traverse, Exhibits "I",Original Unsigned Complaint and Complaint filed in Superior Court with Signatures Alien to the Case).

1.) On Monday, March 10, 1997 the case was called for a pretrial session at 10:30 A.M. Petitioner addressed the Trial Court regarding discovery from Sheriff's Internal Affairs. The Court responded as follows: (Pretrial Tr.19).

> THE COURT: I CAN'T DO ANYTHING ABOUT GETTING INFORMATION ON YOUR -- ON AN INTERNAL INVESTIGATION. THE ONLY

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[5] The Defendant: "They wrote a false report". The Court: "You got the report, Right?" The Defendant: "It's a false report" The Court: "That's trial. What are you going to do, have them write another one? You got a copy of the report. That's the only report."

THING I DEAL WITH IS THIS CASE. SO THE EVENT THAT HAPPENED WITH YOU AND THE SHERIFF IS NOT SOMETHING I CAN CONTROL.

During the correspondence with the Office of the Attorney General Dan Lungren, Petitioner received a letter dated January 9, 1997 (letters from the Attorney General) his office informed Petitioner that he has no jurisdiction over any investigations involving the Sheriff's Department. Portions of the letter states as follows:

> "As we stated in our previous correspondence, the Attorney General's Office cannot be of help to you in this matter. Enforcement of state law is the primary duty of local law enforcement agencies. The Attorney General's role is to ensure that laws are uniformly enforced statewide. Local police authorities are designated the responsibility for investigating violations of law within their jurisdiction. The decision whether or not to file criminal charges in any given case is committed to the discretion of local law enforcement authorities. This decision rests with the local authorities and the Attorney general is not prepared to supersede the local agency. We regret that we cannot be of further assistance to you in this matter."

Article 5, § 13, of the California Constitution states as follows:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the state are uniformly and adequately enforced.
>
> The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the

> investigation, detection, prosecution, and punishment of crime in their respective jurisdiction as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

On February 13, 1998 Petitioner requested that the Superior Court order an inquiry by the trial court into the origination and authenticity of certain documents, (Motion to Augment Record). On May 5, 1998 the Superior Court denied this request as follows:

> "This request, that this court order an inquiry into the origination and submission of various itemized documents, is DENIED"

Petitioner also presented the above stated issues to the California Court of Appeal and California Supreme Court, through Writs of Mandate and State Habeas Corpus petitions. His requests were denied without specificity. Clearly the State had every opportunity to resolve these issues of Public Concern.

3.) The judgment the State pronounced on Petitioner, is insignificant by comparison, to the judgments rendered by the state's failure to take remedial measures, to mitigate the damaging effects to its citizens; and the blatant deprivation of their rights encountered in Petitioner's case. Whereupon citizens are charged with felonies, shackled and herded into courts with presiding Commissioner's that refuse to stipulate to the parties, their legal right to a Magistrate Judge; and the courts refusal to allow Public Defenders at arraignment hearings. According to the California Constitution, Article 1, § (14),: "Felonies shall be prosecuted as provided by law,

either by indictment or, after examination and commitment by a *magistrate*, by information."

4.) Whereupon we are compelled to voice our concerns on specific issues of *unresolved practices* of the Los Angeles County Sheriff's Department. Upon cross-examination from petitioner's trial attorney, (1538.5 Suppression Hearing) Deputy Craig C. Johnson is questioned regarding felony arrests on spousal assaults. Deputy Johnson empathically states that all spousal assaults are felony arrests. During the cross examination, defense council established how many times this practice occurs. The prosecution and the Court obstructed the line of questioning by the defense attorney .

5.) The ramifications of the Trial Court and prosecution to ignore these *defacto arrests* of the Sheriff's Department are the basis of our concerns. California's three-strikes law is among the most severe in the nation, defining a third felony as virtually any crime beyond misdemeanor, including such nonviolent offenses as drug possession, petty theft, writing bad checks and burglary. Three-strikes laws require that all three strikes be serious or violent crimes to merit a life sentence.

6.) A felony spousal assault is a violent offense and would constitute a strike under the three-strikes law. To date there has been no investigation into the practices of the Los Angeles County Sheriff's Department regarding spousal assault arrests. The questions that arise on the above stated events present immediate concerns of *Public Peril*. The Sheriff's Department has acted without humane concern and in complete disregard of the nation's Constitution and with disrespect and in consideration of Ourselves. Therefore, it must be determined how long this practice has continued and are these policies still being implemented today? If so, how many citizens are serving life sentences under the three-strikes law, for these unconstitutional procedures.

7.) Respondent has tried Petitioner on two 273.5 (a) felony counts in a [Municipal Court] and not bound over to the [Superior Court] to answer felony charges. If we

consider the State's process, of adjudicating felonies, this directly applies to *habitual offender enhancement allegations* under Cal.Penal Code § 667. Citizens acquiring felonies under this process, stated supra, are in imminent peril! Petitioner has been convicted on two felony counts. It would stand to reason that the next count would be devastating! We implore the Court to consider this issue. Respondent has failed to support this statement and failed to answer the District's Court's request to establish whether Petitioner was convicted of two felony counts of Cal. Penal Code § 273.5(a) and tried in a Municipal Court. The defendant will always be in the superior court if the defendant is arraigned on an information since an information is filed only if a felony is charged. (See: Cal. Penal Code § 949). A misdemeanor domestic violence offense is defined in Cal. Penal Code § 1000.6 (b),(e). It should noted that the State and Federal courts has never addressed the issues of public peril.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this Court acknowledges the injustice to Petitioner and the Citizen's that were in Peril and rights the wrong by granting this petition for a writ of certiorari.

DATE: December 14, 2001

Respectfully submitted,

KARL M. LEE

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Attorney(s) for: Petitioner in Pro Se

APPENDIX "A"

FILED
September 24, 2001

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

KARL M. LEE,	)	**No. 01-55913**
	)	
Petitioner-Appellant,	)	
	)	**DC# CV-99-01046-DMT**
V.	)	**Central California**
	)	**(Los Angeles)**
ATTORNEY GENERAL	)	
OF THE STATE OF	)	**ORDER**
CALIFORNIA ,	)	
	)	
Respondent-Appellee.	)	
	)	
	)	

Before: PREGERSON and WARDLAW, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253 (c)(2).

FILED
March 31, 2001

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DISTRICT

KARL M. LEE Petitioner, vs. CALIFORNIA STATE ATTORNEY GENERAL, Respondent.	No. CV 99-01046-DT (JWJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dickran Tevrizian, United States District Court Judge, pursuant to 28 U.S.C § 636 and General Order 194 of the United States District Court for the Central District of

California. For the reasons discussed below, it is recommended that the Second Amended Petition be denied and dismissed with prejudice.

I. SUMMARY OF PROCEEDINGS

On January 29, 1999, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C § 2254). On February 4, 1999, this Court filed an "Order Requiring Amended Petition." On February 5, 1999, Petitioner filed a
First Amended Petition. On February 10, 1999, this Court filed an "Order Requiring Second Amended Petition." On February 19, 1999, Petitioner filed a Second Amended Petition ("SAP").

On June 18, 1999, Respondent filed a Return to the SAP, arguing that the SAP was procedurally deficient in various ways. On August 4, 1999, Petitioner filed a Traverse to the Return.

On March 8, 2000, this Court issued a Report and Recommendation which recommended that Petitioner's third, twelfth and thirteenth claims be dismissed with prejudice. On March 24, 2000, notwithstanding Petitioner's Objections, Judgment was entered adopting the Report and Recommendation and denying and dismissing with prejudice claims three, twelve and thirteen from the SAP.

Therefore, on April 25, 2000, Respondent filed a Second Return to the SAP addressing the remaining claims. On May 4, 2000, Petitioner filed a Second Traverse to the Second Return. During this same period, Petitioner sought a Certificate of Appealability from this Court to appeal the March 24, 2000, judgment to the Ninth Circuit. The Court denied the certificate on July 25, 2000 and again on September 14, 2000 in an Amended Memorandum and Order (having corrected minor mistakes in the earlier order). On August 8, 2000, Petitioner filed a request for a Certificate of Appealability with the Ninth Circuit concerning the earlier judgment in this case (Ninth Circuit Case No. 00-56319). That request is still pending as of the filing date
of this Report and Recommendation.

II. BACKGROUND

Petitioner seeks relief from his May 2, 1997 conviction on two charges of "corporal injury" upon "[a] *person with whom he* ... is cohabiting," in violation of California Penal Code § 273.5(a). (Respondent's Lodgment (1/24/00) (Clerk's Transcript), 362-63). The court conditionally sentenced Petitioner to three years suspended imposition of the sentence, and ordered Petitioner to serve 30 days in the Los Angeles County Jail, with credit for five days already served. (Id..).

III. PETITIONER'S GROUNDS FOR RELIEF

In the judgment entered on March 24, 2000, the Court dismissed three of Petitioner's claims with prejudice (claims 3, 12 & 13). Petitioner's remaining grounds for relief are as follows:[1]

1. Petitioner was denied assistance of counsel at this arraignment in violation of the Sixth Amendment. (SAP 9-10).

2. Petitioner's Fourth Amendment rights were violated when officers arrested him in his home without a warrant. (SAP 10).

4. Petitioner's right to due process was violated when the trial court refused to rule on the validity of Petitioner's arrest. (SAP 10-11)

5. There was insufficient evidence of the two charges of abuse in violation of the due process clause. (SAP 11).

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[1] The Court will not address what appear to be additional claims raised for the first time in the Traverse or Second Traverse. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief."); cert. Denied, 514 U.S 1026, 115 S.Ct. 1378, 131 L.Ed.2d 232 (1995).

5(a) Petitioner's right to due process was violated when the prosecution knowingly introduced perjured testimony. (SAP 11-12).

6. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment due to his trial counsel's illness. (SAP 12).

7. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment when his trial attorney failed to disclose Petitioner's alibi witness to the prosecution in a timely manner. (SAP 12-13).

8. Petitioner's due process rights were violated when the trial court excluded his alibi witness' testimony as a discovery sanction. (SAP 13).

9. Petitioner's right to due process was violated when the trial court failed to present defense cross-examination of a witness. (SAP 13-14).

9(a) Petitioner's right to due process was violated when the trial court denied a defense request for a continuance to obtain evidence. (SAP 13-14).

10. Petitioner's right to due process was violated when the trial court permitted a prosecution witness to testify without proper foundation. (SAP 14).

11. Petitioner's right to due process was violated when the trial court failed to advise Petitioner of his right to a speedy trial. (SAP 14-15).

III. DISCUSSION

A. Procedural Default

After "conced[ing] in all candor that Petitioner's experience as they relate to this case seem to bear the markings of a Kafkaesque nightmare." Respondent argues that Petitioner has procedurally defaulted all of his claims in

state court and that federal habeas review is therefore barred. (Second Return, 21). Respondent is incorrect.[2]

4. State Procedural Bar

Respondent argues that all of Petitioner's claims (except claim 1) are procedurally barred because the California Supreme Court denied the habeas petition containing these claims under state procedural rules. (Second Return, 22-26). Specifically, the California Supreme Court denied Petitioner's habeas petition with citations to In re Swain, 34 Cal.2d 300, 304 (2949); In re Dixon, 41 Cal.2d 756, 759 1953, and In re Lindley, 29 Cal.2d 709, 723 (1947). (Respondent Lodgment (4/19/00), 630).

Respondent contends that these citations serve as "adequate and independent state ground[s]" for denying the claims contained in these state petitions and therefore bar federal review of these claims by this Court. Calderon v. United States District Court (Bean), 96F.3d 1126, 1129 (9th Cir. 1996) (citing Coleman v. Thompson,501 U.S. 722, 729 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)), cert. denied, 520 U.S. 1204, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997). However, in order for the state rules invoked in these denials to stand as procedural bars to this Court's review, each must be "adequate and independent" because "the California Supreme Court invoked [all the] rules without specifying which rule applied to which . . . Claims." Washington v. Cambra, 208 F.3d 832, 834 (9th Cir.), cert. denied, –U.S. –, 121 S.Ct. 282, 148 L.Ed.2d 203 (2000).

The state court denial cannot stand as a procedural bar to this Court's review because it invoked In re Dixon, the California rule which precludes habeas relief where a

---

[2] Because of the parties' deficient pleadings and exhibits and filings of numerous unwarranted papers, the Court has been forced to piece together the true nature of this case by searching through disorganized and often inadequate legal work and has expended far more of its own resources than should have been required to decide the merits of this case

petitioner could have, but did not, raise his habeas claims in a timely appeal. Washington, 208 F.3d at 833-84. This rule, as applied to Petitioner's claims, is not an "independent" state law procedural ground sufficient to bar federal review. "For a state procedural rule to be 'independent,' the state law ground for decision must not be 'interwoven with the federal law." Park v California, 202 F.3d 1146, 1152 (9th Cir.) (quoting Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), cert. denied, – U.S. –, 121 S..Ct. 277, 148 L.Ed.2d 202 (2000).

"With respect to the Dixon rule, [the Ninth Circuit] ha[s] held that a relevant point of reference for assessing its application is the time at which the petitioner had an opportunity to raise the claims on direct appeal. "Fields v. Calderon, 125 F.3d 757, 760-61 (9th Cir. 1997) (citation omitted), cert. denied, 523 U.S. 1132, 118 S.Ct. 1826, 140 L.Ed.2d 962 (1998); see also Washington, 208 F.3d 832 (examining application of Dixon rule as of time petitioner filed direct appeal to California Court of Appeal). "[T]he procedural default, though announced by the California Supreme Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been included for review." Fields, 125 F.3d at 761. This interpretation ensures fair notice to petitioners of state procedural rules by requiring that "the rule be in existence at the time of the claimed default" in order for it to bar later federal review Id.

Petitioner's direct appeal began in 1997 when his appellate attorney filed a Notice of Appeal in Municipal Court. (Respondent's Lodgment (1/24/00), 335). Therefore, 1997 is the "trigger" date for analyzing the application of Dixon, because it was Petitioner's failure to include his current federal claims in his direct appeal that led to their default in state court under Dixon. Prior to 1998, when the California Supreme Court decided In re Robbins, 18 Cal.4th 770 (1998), application of the Dixon rule necessarily entailed an examination of federal constitutional claims. Park, 202 F.3d at 1152. Because the Court must examine the application of Dixon as of 1997 when Petitioner conducted his direct review, the Dixon citation is not an independent

state ground sufficient to bar federal review in Petitioner's case. Park ,202 F.3d at 1152-53. To hold otherwise would deprive Petitioner of fair notice of the application of the Dixon rule. See Fields, 125 F.3d at 761 (holding that using the date of the direct appeal, i.e., the time of the actual default, to examine application of Dixon rule ensures petitioners receive adequate notice of rule's application). Therefore, the state default is insufficient to bar federal habeas review.[3]

5. Default under Williams v. Taylor, 529 U.S. 420 (2000)

Respondent also argues that the Court is barred from addressing the merits of Petitioner's claims because Petitioner failed to develop the factual basis of his claims and therefore "the federal claim[s] [are]not preserved" under 29 U.S.C. § 2254 (e)(2).[4] (Second Return, 26). Respondent claims that this rule is the

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[3] Moreover, even if the state court default was not inadequate to bar federal review under the above analysis, as the Court clearly explained in its earlier Report and Recommendation, "[s]tate procedural bars are not immortal . . . they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal–court review that might otherwise have been available." Ylst v. Nunnemaker , 501 U.S. 797, 801, 111 S.Ct. 2590, 155 L.Ed. 2d 706 (1991). Respondent, however, did not address this issue in its Second Return. The Court will not assume that the state default stands despite later state court rulings which may or may not have addressed these claims, nor will it search through the disorganized exhibits of state rulings and petitions in order to determine what default may or may not have expired.

[4] Section 2254 provides: "If the applicant has failed to develop the factual basis of a claim in State
court proceedings, the court shall not hold an evidentiary hearing on the claim . . ." 28 U.S.C. §2254 (e) (2).

Supreme Court's holding in Williams v. Taylor, 529 U.S. 120 420, 120 S.Ct. 1479, 146 L.Ed.2d. 435 (2000). However, as the Supreme Court clearly explained in Williams, "[t]he question in this case is whether 28 U.S.C.§ 2254(e)(2) . . . as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AED.) . . .bars the evidentary hearing petitioner seeks [because] [i]f petitioner 'has failed to develop the factual basis of [his] claim[s] in State court proceedings,' his case is subject to § 2254(e)(2), and he may not receive a hearing because he conceded his inability to satisfy the statute's further stringent conditions for excusing the deficiency." Id.., 529 U.S. at 424 (emphasis added). This holding has no bearing on procedural default, it relates only to the availability of an evidentiary hearing. Id., 529 U.S. at 429 ("[W]e . . . granted certiorari to decide whether § 2254(e)(2) precluded [petitioner] from receiving an evidentiary hearing on his claims.")

B. Exhaustion

Respondent has argued that a number a Petitioner's claims were never presented to the California Supreme Court, although Respondent does not specifically address the exhaustion problem in its Second Return.(SeeReturn,18-20. Second Return, 26). It appears that Respondent may be correct at least with respect to claim 1. (Respondent's Lodgment (4/19/00), 624, Respondent's Lodgment (1/24/00), 369-73). Normally, of course, a petitioner is required to exhaust state court remedies before proceeding with a federal habeas corpus petition. 28 U.S.C. § 2254(b). However, the Court has reviewed the merits of all of Petitioner's claims and, as explained below, finds each of them to be meritless. Therefore, under 28 U.S.C. §2254(b)(2), the Court recommends denying all the claims on their merits.

C. Standard for Reviewing Merits of Claims

Because the petition initiating this action was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the SAP must be previewed under the AEDPA's provisions. Lindh v. Murphy, 521 U.S.

320, 117 S.Ct..2059, 138 L.Ed.2d 481 (1997). The relevant portions of the AEDPA provide as follows:

(d) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254. Under the AEDPA, a federal court shall presume that a determination of factual issues made by a state court is correct, a Petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e) (1). The Supreme Court has explained the standard of review under the AEDPA as follows:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decided a case differently than the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case. Williams v. Taylor , 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Ninth Circuit has held that "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Weighill v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000). Under the AEDPA, circuit law, "may be persuasive authority for purposes of determing whether a particular state court decision is an 'unreasonable application'of Supreme Court law, and also may help [a federal habeas court] determine what law is 'clearly established.'" Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000) (quoting Duhaime v. Ducharme, 200 F.3d 597,

600 (9th Cir. 2000)). However, "only the Supreme Court's holding are binding on the state courts and only those holdings need be 'reasonably' applied." Id.

D. Review of the Merits of Petitioner's Claims

As explained below, none of Petitioner's claims entitle him to habeas relief and the Court should deny the SAP with prejudice in its entirety.

1. Denial of Counsel (claim 1)
2. Petitioner's first claim is that he was denied assistance of counsel at his arraignment in violation of the Sixth amendment. (SAP -10). He claims that he requested representation by the public defender, however no attorney appeared at his arraignment. (Id.; Second Traverse, 27).

Petitioner does not contend that he was not advised of his right to counsel prior to his arraignment; rather he admits, "[f]ifteen minutes before my court appearance the deputies played a tape recorded message of our rights." to Petitioner and other defendants in a holding cell. (Second Traverse, 27). Thereafter, the following colloquy occurred at Petitioner's arraignment:

The Court: In Court I it is alleged that on or about June the 6th 1996 that you violated Penal Code Section 273.5(a), inflicting injury upon a person with whom you were living, and it is also alleged in Court II that you violated Penal Code Section 273.5(a), inflicting Injury upon the same victim, Jeannette Gorman, this occurring on June the 4th, 1996. How are you pleading to these two separate violations? Guilty or not guilty?

[Petitioner]: Not guilty, Your Honor.

The Court: Will you be hiring a lawyer, representing yourself or need a Public Defender?

[Petitioner]: Your Honor, may I request O.R. (release on own recognizance]?

The court: We will get to that issue in just a moment. Will you be hiring a lawyer, need the Public Defender or representing yourself?

[Petitioner]: Public Defender.

The Court: Public Defender will be appointed. You want to be released on your own recognizance; it that correct?

[Petitioner]: Your Honor, yes I have had a job for 13 years. If I lose it, I lose my ability to possibly pay for the lawyer and . . .

The Court: Okay. Do the People wish to be heard?

[The People]: Yes, Your Honor. The defendant's mother is present. She wishes his release. She has provided a copy for the Court and a copy for the Defense. Basically, they attack the victim; however, for the purposes of this hearing, the People would ask that the Court presume the charges to be true based on the nature of the charges and that the Court set bail.
The Court: [Petitioner], do you have any objection to the Court looking at the police report for purposes of determining whether bail should be set or if you should be released on your own recognizance?

[Petitioner]: Whatever would expedite the – yes.

The Court: [Petitioner], I will be setting bail in this matter at $40,000. You do have the Public Defender, and we will set this matter for a pretrial on June the 17th, 1996, 9:00 o'clock a.m. in Division II If you bail out, make sure you are in the Public Defender's Office that morning at 8:00 o'clock. The Public Defender's Office is located around the rear between Divisions III and IV.

(Petitioner's Lodgment (2/19/99), Exh.1 (R.T. (Arraignment)), 2-3).[5] As the United States Supreme Court has held: "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage." United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In such circumstances, "[n]o specific showing of prejudice [is] required, "because" the adversary process itself [is] presumptively unreliable." **Id.**

Whether a proceeding is a "critical stage" depends upon "whether potential substantial prejudice to defendant's rights inheres in the confrontation and the ability of counsel to help avoid that prejudice."Coleman v. Alabama, 399 U.S. 1 ,9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (citation, internal quotations and ellipses omitted). An arraignment, in some instances, may constitute a critical stage of trial. See Hamilton v. Alabama, 368 U.S. 52, 53, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment under Alabama law is a critical stage because defense of insanity must be pleaded then or lost and other important motions must be made then or forfeited); White v. Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963) (preliminary hearing is a critical stage where defendant pleads guilty without assistance of counsel then later pleads not guilty with counsel present but earlier guilty plea introduced as evidence at trial).

It is not clear that arraignment constituted a critical stage in Petitioner's trial, however. Under California law, the

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[5] Despite two orders from this Court, Respondent failed to lodge all relevant transcripts from Petitioner's trial. It is only because Petitioner himself lodged the pre- trial transcripts that this Court was able to proceed without having to order Respondent to provide all the relevant state court documents for a third time. (See Court's Orders of March 8, 1999 and January 3, 2000).

"purpose of an arraignment . . . is to inform the accused of the charge against him and to give him fairly the opportunity to plead to it." In re Mitchell, 56 Cal.2d 667, 670 (1961); see also Cal. Penal Code § 988 ("The arraignment . . . consists in reading the accusatory pleading to the defendant . . . and asking the defendant whether the defendant pleads guilty or not guilty to the accusatory pleading. . ."). Therefore, other than pleading to the charges against him, a defendant in California state court does not necessarily face other critical decisions which could affect the remainder of his criminal proceedings. This distinguishes an arraignment under California law from the Alabama and Maryland pre-trial proceedings analyzed in Hamilton and White.

Most importantly, Petitioner pleaded not guilty (which he has never suggested was not his wish) and nothing else occurred at his arraignment which could have affected his trial or conviction in any way. Therefore, in Petitioner's case, no Sixth Amendment violation occurred when he was not represented by counsel at arraignment. Baker v. City of Blaine, 221 F.3d 1108, 1110-11 (9th Cir. 2000) (where petitioner pleads not guilty and "nothing else that occurred at arraignment was material to later trial proceedings," he has "no constitutional right to counsel at his arraignment of which he could have been deprived") Johnson v. United States of America, 361 F.2d 447, 448 (9th Cir. 1966) ("Denial of counsel at preliminary hearing is not grounds for reversal where the record discloses no opportunity for prejudice."); Wilfong v. Johnston, 156 F.2d 507, 509 (9th Cir. 1946) (finding no prejudice in lack of counsel at arraignment where "a plea of not guilty was entered for the defendant; before trial he secured counsel of his own choice [and] had an opportunity to confer with such counsel.")

In fact, the Supreme Court recently endorsed a similar interpretation of the Sixth Amendment right to counsel in Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed2d 985 (2000). In Flores-Ortega, defense counsel failed to file a notice of appeal without defendant's consent. Id., 528 U.S. at 473. Although this failure resulted not only in a denial of counsel during the critical stage of appeal, but denied the judicial proceeding itself, which "similarly

demands a presumption of prejudice," the Court nonetheless required the defendant to make some showing of prejudice before finding a constitutional violation. Id., 528 U.S. at 483-84. Specifically, the Court held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id., Although this is a slightly different case than Petitioner's, it shows that although there is a "presumption of prejudice" in certain circumstances (denial of counsel and denial of judicial proceedings), the record must at least demonstrate a possibility that prejudice could have occurred before a court may find a constitutional violation requiring reversal.

Here, Petitioner never suggests, and the Court would not find it credible if he did, that he desired to plead other than not guilty at his arraignment. Although he also apparently wished to be released on his own recognizance, the issue of his bail is not one that affects any later proceedings or that Petitioner has shown in any way prejudiced him in his trial. Therefore, either Petitioner's arraignment was not a critical stage, or if it was, the presumption of prejudice is rebutted because he pleaded not guilty and the arraignment proceedings in no way affected his rights during trial. Baker, 221 F.3d 1108; Flores-Ortega, 528 U.S. 470.

2. Fourth Amendment Claims (claims 2 & 4)

Petitioner's second and fourth claims allege violations of his Fourth Amendment rights to be free from unreasonable search and seizure. (SAP 10-11). Respondent contends that Petitioner is not entitled to relief on these two claims because "he has never shown any prejudice flowing from his warantless arrest at home." (Second Return, 29). Both parties have overlooked the critical law on this subject, however; these claims cannot be addressed by this Court on habeas review. "[W}here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976). Petitioner presented and argued these claims to the trial court and the California Supreme Court. (See Petitioner's Lodgment (2/1999), Exh. 3 (R.T.(Suppression Hearing)); Respondent's Lodgment (1/24/00), 369-73 (Petitioner's Engrossed Proposed Statement on appeal, later incorporated into Habeas Petition to California Supreme Court (see Respondent's Lodgment (4/19/00), 624). Therefore, he has "had the opportunity to litigate his claim[s], . . . [and] whether the claim[s] [were] correctly decided[,]" they do not merit habeas relief under Stone v. Powell.Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996).

3. Insufficient Evidence (claim 5)

Petitioner argues that there were insufficient evidence of the two abuse charges because" the individual who alleged the spousal abuse assertions could not support the charges by visible injuries or witnesses [a]nd the alleged victim refused officer Daly's request for treatment and any photos." (SAP 11). The standard for evaluating sufficiency of the evidence is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v.Virginia, 443 U.S. 307 319, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979) (emphasis in original). All evidence must be considered in the light most favorable to the prosecution. Id. These standards are applied to the substantive elements of the criminal offense defined by state law. Id. 443 U.S. at 324. This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id., 443 U.S. at 319. Assessing the credibility of the witnesses, including the victim and Petititoner, is beyond this Court's scope of review. Schlup v.Delo, 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

California Penal Code § 273.(a) provided as follows at the time of Petitioner's conviction:

> Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person with who he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by .both.

Cal. Penal Code § 273.5 (a) (1996). Therefore, in order to convict Petitioner, the jury had to find that on twō instances: 1) Petitioner lived with the victim; 2) Petitioner willfully inflicted corporal injury on the victim; and 3) such injury resulted in a traumatic condition ("a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force: (Cal. Penal Code § 273.5(c)). The victim testified that she lived with Petitioner during June 1996. (R.T. (Trial) 8-9). She testified that on June 6, 1996, Petitioner hit her in the face and pulled her hair, leaving her face "real red from him hitting me." (R.T. (Trial) 10-12, 15). She also testified that on June 4, 1996, Petitioner kicked her on her leg, leaving her with a bruise the "size of a fist." (R.T. (Trial) 16-17). The

deputy sheriff who responded to the victim's 911 call on June 6 also noted that the victim had a red mark on her face, "kind of like a hand print" and had a "large bruise on her left leg." (R.T. (Trial) 65).

There is no requirement that the charges against Petitioner must have been proven by anything other than the victim's testimony (which was corrobotated by the deputy sheriff in some instances). United States v. Archdale,, 229 F.3d 861, 67 (9th Cir. 2000) (where victim's testimony, if believed, was sufficient to sustain conviction, defendant not entitled to reversal because credibilitity is for jury to determine). The jury was free to credit the victim's testimony and discredit Petitioner's, which it apparently did, and the victim's testimony was sufficient, if believed, to sustain convictions on the two charges of abuse. Jackson, 443 U.S. at 319; Schulp, 513 U.S. at 330. The California courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254 (d).

4 Prosecutorial Misconduct (claim 5 (a)).

Petitioner argues that the prosecutor knowingly introduced the perjured testimony of the victim's neighbor that the victim used the neighbor's telephone to call 911 to report the abuse by Petitioner on June 6, 1996. (SAP 11-12; Second Traverse, 33). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v.Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Mere inconsistencies in testimony are not enought to establish that a witness' testimony was false or that the prosecutor knowingly used false testimony. United States v. Sherlock, 962 F.2d 1349, 1364 (9th Cir. 1989), cert. denied, 506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992). The matter of a witness' credibility, when explored on cross- examination,

"is properly a matter for the consideration of the jury." Carothers v.Rhay, 594 F.2d 225, 229 (9th Cir. 1979).

At trial, the victim testified that she called the police from her neighbor's trailer after Petitioner removed the phone from the trailer she shared with him on June 6. (R.T. (Trial) 12, 23-24). In cross-examining the victim, Petitioner's counsel played a recording of the 911 call in which the victim stated that she was calling from the neighbor's phone. (R.T. (Trial) 28-30). Defense counsel asked the victim a number of times from whose residence she made the phone call. (R.T. (Trial) 23-24 31-34, 51-52). The neighbor testified that the victim used his telephone to call the police on the evening of June 6, 1996. (R.T. (Trial 263, 277). Petitioner testified that he did not know the victim telephoned the police on June 6. (R.T.(Trial) 189). He also testified that the 911 call was made from his house and that he believed this to be true, although he testified he was not present at the time, based on "[t]hose papers you [the prosecutor] gave me." (R.T. (Trial) 209).

Petitioner's counsel attempted to obtain and introduce the record of the 911 call which, he maintained, showed the origin of the victim's 911 call. (R.T. (Trial) 33, 245). The defense argued that "[t]he transcript will show the origin of call was from - - we maintain it's from [Petitioner's] phone and anything else is perjury."(R.T. (Trial) 245). The trial court denied counsel's request on the basis that it was made far too late into trial. (R.T. (Trial) 246). As the court ruled: "The only issue here is where the call came from. [The victim] said it came from a neighbor's residence. Your client said it came from his trailer. Now we have another individual who will come in and say, I imagine, he saw they were made from his trailer. That's as far as it's going to go." (R.T. (Trial) 246).

Petitioner renews the claim he made to the trial court to this Court, i.e., that the prosecution knowingly introduced the perjured testimony of the victim's neighbor that the 911 call was made from the neighbor's residence and not the home shared by Petitioner and the victim. First of all, although Petitioner alleges that the prosecutor knew this testimony was false, he does not present any evidence to

support this claim. In fact, the prosecutor apparently believed the documents she possessed and shared with Petitioner contradicted Petitioner's interpretation of the call's origin. {R.T. {Trial) 209).

Although Petitioner provides sheriff's "incident logs" showing what is apparently his phone number, these appear to be the same documents shown to the sheriff's deputy at trial which she explained "could be or could not be" showing the origin of the 911 call. (See R.T. (Trial) 87; Petitioner's Lodgment (2/19/99), Exh. G; Petitioner's Lodgment (8/4/99), Exh. F; R.T. (Trial) 324 (referencing Defense Exhibit C from trial, call log, in closing argument)). Moreover, Petitioner references the transcript of the 911 call to show that the victim clearly stated she was calling from the residence she shared with Petitioner. (See SAP 11), That transcript is hardly so clear, however. In it, the victim stated she was at her neighbor's house using his phone (R.T. (Trial) 29 but she later gave what is apparently Petitioner's phone number to the operator. (R.T. (Trial) 30).

Petitioner has filed an extraordinary number of documents which he argues support his claims in one way or another. Therefore, the Court finds it impossible to believe that if Petitioner had any documents which actually supported his claim that the neighbor's testimony was false and that the prosecutor knew it was false that he would not have provided them by now, especially when he apparently believed he was in possession of the proof of the origin of the 911 call at trial. (See R.T. (Trial) 209 (where Petitioner states that papers from prosecutor were the basis for his assertion that 911 call was made from his house); RF.T. (Trial) 246 (where referencing the transcript of the 911 tape, Petitioner stated, "The origin is from my house. It's been confirmed.")' SAP 11 (where Petitioner argues "the people had previously provided the defense with a printout of [t]he call made to the emergency '911' telephone number showing that the origin of the call was [Petitioner's phone number]."): Petitioner's Lodgment (2/19/99), Exh. G). As noted above, these documents appear to be the same ones identified at trial as to which the sheriff's deputy testified may or may not show the actual origin number of the 911 call. Because

Petitioner's claim is apparently based on documents which a witness testified at trial do not support Petitioner's conclusion this Court cannot say that the California courts unreasonably denied this claim. 28 U.S.C § 2254(d).

Nevertheless, even if the Court were to assume that Petitioner is correct and that the prosecution did knowingly introduce perjured testimony, he is entitled to habeas relief only if "there is any reasonable likelihood" that the introduction of this testimony affected the jury's judgment, Agurs, 427 U.S. at 103, or if the introduction of the evidence puts the whole case in such a different light as to undermine confidence in the verdict. Grisby v. Blodgett, 130 F.3d 365, 368 (9th Cir. 1997) The evidence does not meet this standard. The victim's credibility as to the 911 call was already an issue before the jury, as she appeared somewhat confused as her testimony related to the timing and circumstances of making the 911 call, and the neighbor's credibility was impeached with a prior felony conviction. (R.T. (Trial) 23-24, 31-34, 51-52). In fact, the jury heard the actual 911 call along with the testimony of the deputy sheriff who answered that call (including her description of the victim's injuries). Therefore, even if the evidence was improperly admitted, there is no reasonable likelihood that it affected the outcome or that it should lessen the Court's confidence in the verdict. Agurs, 427 U.S. at 103; Grisby, 130 F.3d at 368.

The California Courts' denial of this claim was neither contrary to, not an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C.§ 2254(d).

5. Effective Assistance of Counsel Claims (claims 6 & 7)

Petitioner argues in his sixth & seventh claims that he was denied effective assistance of counsel. (SAP 12-13). To establish a prima facie claim of ineffective assistance of counsel, Petitioner must demonstrate that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Petitioner bears the burden of establishing both components. Id.,

Deficient performance is performance which is objectively unreasonable under prevailing professional norms. Id., 466 U.S. at 687-88. Under Strickland, counsel's deficient performance prejudices a petitioner where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 466 U.S. at 694. Prejudice "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

In reviewing trial counsel's performance, the Court will strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made. Strickland, 466 U.S. at 689. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, were outside the "wide-range of professionally competent assistance," will Petitioner meet this initial burden. Id.,
466 U.S. at 690.

a (Claim 6)

Petitioner's sixth claim is perhaps the most poorly explained of all of his claims; in it he complains that his counsel was sick with some major illness which necessitated delays in the trial and, based on this sickness,"[i]t's obvious that Attorney Smith could not have effectively handled Petitioner's case." (Second Traverse, 33). Even construing Petitioner's pleadings as liberally as possible, the Court is at a loss to discern whether Petitioner is upset about the delays counsel obtained or that he didn't do more to win further delays. (See SAP, 12; Second Traverse; 33-34). Both of these arguments are meritless.

The Court suspects that it is more likely that Petitioner's argument is that counsel was so sick in trial that he should have sought further continuances. (See Second Traverse, 33-34 ("If Attorney Smith would have obtained a sworn affidavit from a doctor, a continuance would have been granted from day to day."). However, counsel's

sickness, by itself, does not mandate a finding of ineffective assistance absent a finding of deficient performance and prejudice. Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (attorney's drug use is irrelevant if petitioner does not make showing that attorney's behavior was objectively unreasonable and prejudicial, cert.denied, 516 U.S. 1051, 116 S.Ct. 718, 133 L.Ed.2d 671 (1996); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (holding same), cert. denied, 476 U.S.1164, 106 S.Ct. 2290, 90 L.Ed.2d 731 (1986); cf. United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985) (no presumption of prejudice from sleeping counsel where counsel only sleeps during a portion of trial), cert. denied, 479 U.S. 843, 107 S.Ct. 154, 93 L.Ed.2d 94 (1986). Petitioner has not made any such showing, he does not explain what counsel supposedly did wrong, or how it might have affected his defense.

If Petitioner is arguing the contrary, that counsel was ineffective because he sought and obtained too many continuances, then this claim fails as well. Petitioner has not alleged any way in which he was prejudiced by counsel's actions, which he apparently consented to at trial. *(See e.g.* Petitioner's Lodgment (2/19/99), Exh. 2 (R.T. (Pretrial Conferences)), 3-4, 5-6, 10-12). Whatever the actual nature of Petitioner's claim, its denial by the California courts was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

*b. (*Claim *7)*

Petitioner's seventh claim is that counsel was ineffective for failing to disclose "the identity of an alibi witness, [Petitioner's] father, who would testify that [Petitioner] was present with him during the time of the alleged offense." (SAP 12- 13). The following took place on Wednesday, April 30, 1997, the second day of the trial and midway through the defense presentation of its case:

> [The People]: Your Honor, I have an offer of proof to the next witness [sic]. This witness sat in through

part of the testimony It wasn't disclosed to me until mid trial. I don't know what the relevance is.

The Court: Your next witness is going to be who?

[Defense]: [Petitioner's] father.

The Court: What is the offer of proof as to [Petitioner's] father?

[Defense]: He would testify that [Petitioner] was on -- they have a boat in Long Beach, it's a family project. He was on the boat at the time of the incident.

The Court: Alibi witness for June 6?

[Defense]: Yes.

The Court: Was there any reason he wasn't disclosed to the People prior to trial as being an alibi witness?
[Defense]: I really hadn't [sic] the information per se, and there was nothing that I could turn over to the People other than his name.

The Court: Did you turn over his name to the People?

[Defense]: I told then about it when I learned about it.

[The People]: Mid way through trial.

The Court: Key element of the evidence is alibi.

[Defense]: Not necessarily the key.

The Court: Alibi is certainly a key element and you haven't learned about it until the second day of trial? When did you get the name, today?

> [The People]: I didn't know he was going to be an alibi witness until this moment. I was told that he was a potential witness, and I underlined "potential."
>
> [Defense]: That's correct. I hadn't made a decision whether I was going to need to call him.
>
> [The People]: Mid trial?
>
> The Court: [Petitioner], you have an attorney who will speak for you, please
>
> [Petitioner]: I understand, your honor.
>
> The Court: I'm not going to permit [Petitioner's] father to testify. Essential witness – this information, this information should have been known earlier in the case, not almost nine months after this event took place. And I think the nondisclosure of that witness and the nature of his testimony on the day of trial is improper and I will, as a sanction, [order] that witness will not testify in this case.

(R.T. (Trial) 177-78). Immediately after the court's ruling, Petitioner addressed the judge directly by his first name) to discuss a wholly unrelated issue of authorizing a federal investigation into claims the victim made to the jury. (R.T. (Trial) 179-81). Petitioner did not mention his father or his aborted testimony in his direct conversation with the trial judge. The next day, the following exchange took place:

> [Defense]:Your Honor, for purposed of the record, I instructed my client that I would be requesting . . . I would renew my motion to allow [Petitioner's] father to come in and testify for the alibi purpose. And I instructed that to my client . My client informed me that his father was ill and in Long Beach. And I did not know, I did not represent to my client that the court would allow it or not allow it.

The Court: As I indicated to counsel yesterday, that [Petitioner's] father was called as a witness or going to be called as a witness yesterday. That was the first indication to anyone that [Petitioner's] father was a witness. That was on the third [sic] day of trial.

[Defense]: No Your Honor, I informed counsel of that prior to that.

[The People]: Not that he was going to be an alibi witness.

The Court: There was never an exchange of this witness name or statement made by [Petitioner's] father indicating that [Petitioner's father] was going to be an alibi witness as to [Petitioner's] whereabouts on June 6. That is a very crucial piece of evidence that I don't think could be given to opposing counsel on the third [sic] day of trial. I think that is something that is known far in advance, should have been done well in advance. I think it's violation [sic] of discovery statutes and the sanction is that [Petitioner's] father will not testify in this case. I'm going to stick by that sanction that I indicated yesterday. So [Petitioner's] father will not testify in this case. The information - -
[Defense]: I'm sorry?

The Court: - - About [Petitioner's] father not being provided to the District Attorney until the third [sic] day of trial, and it was not something that was just discovered by the defense. I think it's unreasonable for the court to believe that [Petitioner's] whereabouts on June 6 were just discovered by the defense on the third [sic] day of trial.

(R.T. (Trial) 249-50). Finally, in the course of Petitioner's motion for a new trial based on ineffective assistance of trial counsel, the following occurred:

[Defense]:. . . Just to point out to the court I did look at the transcript and the court itself pointed out to prior defense counsel that the alibi witness was a key element to the defense and should have been disclosed to the People in a timely manner. That was not accomplished.

The Court : Also, if you reviewed the transcript, you could see that that alibi witness was not even - - the information concerning the alibi witness is not even given to defense counsel until the third day of trial by the defendant. I found that to be unbelievable since the alibi witness was the father and this happened about a year before the trial. And the issue concerning the alibi witness, I think my ruling was appropriate on that, and I don't see any basis for a new trial in this case.

[Defense]: Your Honor - -

The Court: Counsel is dealing with a difficult defendant, I think he did a good job of dealing with a difficult defendant, and I'm going to deny the motion for a new trial.

(Petitioner's Lodgment (8/4/99), Exh. C (R.T. (New Trial Motion)), 2-3). Petitioner does not allege that his attorney had the information about his alleged alibi any sooner than when he presented it to the prosecution and the trial court. In fact, Petitioner's pleadings suggest counsel was not aware of Petitioner's father's potential testimony. (See SAP 13 (Petitioner's only statement of attorney's knowledge is that "it is difficult to believe that dependant's attorney could not have foreseen the fact that the father could serve as an 'alibi' witness.")). The record also does not suggest that counsel was aware the Petitioner had an alibi defense prior to midway through the trial. If counsel did not know of the alibi, obviously he is not to be held responsible for failing to disclose it to the court and the prosecution. Petitioner has not shown that counsel's performance was

constitutionally deficient. Ames v. Endell, 856 F.2d 1441, 1444 (9th Cir. 1988) (counsel's duties are shaped by information provided by defendant); United States v. Grewel, 825 F.2d 220, 222-23 (9th Cir. 1987) (same).

The California courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

6. Exclusion of Defense Witness (claim 8)

Petitioner's eight claim is that the trial court violated his constitutional rights when it precluded his father from testifying on his behalf. (SAP 13). As explained above, the trial court did not allow Petitioner's father to testify because he had not been identified as an alibi witness prior to midway through the defense case at trial. Although Petitioner labels this due process claim, it should be analyzed under the compulsory process clause of the Sixth Amendment.

In Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed 798 (1988), the Supreme Court held that preclusion, when used as a sanction for a discovery violation, may be permissible under the Sixth Amendment. As the Court wrote: "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly." Id., 484 U.S. at 419. [I]n making a determination as to whether a defendant's Sixth Amendment rights were violated the exclusion of alibi testimony; a court should balance a defendant's right to have witness testify in his or her behalf against 'countervailing public interests.'" Eckert v. Tansy, 936 F.2d 444, 446 (9th Cir. 1991) (quoting Taylor, 484 U.S. at 414-15). "The State's interest in protecting itself against an eleventh-hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts." Taylor , 484 U.S. at 412. "It is . . . reasonable to presume that there is something

suspect about a defense witness who is not identified until after the 11th hour has passed." Id., 484 U.S. at 414.

Here, the trial court questioned defense counsel as to the late notification above the alibi defense, and satisfied itself that it was properly excluded because "this information should have been known early in the case not almost nine months after this event took place." (R.T. (Trial) 178). As the court noted, "alibi is certainly a key element," and it is doubtful that the defense just learned about it after the close of the prosecution's case on the second day of trial. (Id.; see also R.T. (Trial) 249-50). The court did not violate Petitioner's Sixth Amendment compulsory process clause rights when it precluded Petitioner's father from testifying, at the last minute and with no prior notice, that Petititoner was with him at the time of one incident for which Petitioner was convicted. Taylor, 484 U.S. 400; Eckert, 936 F.2d 444.

The California court's denial of this claim was neither contrary to, nor an unreasonable application of , clearly, established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

7. Denial of Cross-Examination of Prosecution Witnesses (claim 9)

Petitioner's ninth claim has two unrelated parts. The first portion of the claim is that the trial court violated his due process rights when it refused to allow him to recall the victim to cross-examine her about her "developmental disability" (SAP 13-14). A criminal defendant has a right to cross-examine adverse witnesses under the Sixth Amendment confrontation clause. Davis v.Alaska, 415 U.S. 308, 315-1`6, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, as the Supreme Court has explained It does not follow, of course, the Confrontation Clause of the Sixth Amendment revents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits n such cross-examination based on concerns above, among other things, harassment, prejudice, confusion of the

issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And . . . "the Confrontation Clause guarantees an opportunity for effective cross-examination, notcross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original). Delaware v. Van Arsdall,. 143 475 U.S. 673, 679, 106 S.Ct 1, 89 L.Ed.2d 674 (1986). A reviewing court "normally will hold the trial court violated the Sixth Amendment only if the jury was denied 'sufficient information to appraise the biases and motivations of the witness.'" United States v. Jenkins, 884 F.2d 433, 436 (9th Cir.), cert. denied, 493 U.S. 1005, 110 S.Ct. 568, 107 L.Ed.2d 562 (1989) (quoting United States v.McClintock, 748 F.2d 1278, 1290 (9th Cir. 1984)).

Petitioner's Sixth Amendment rights were not violated when the trial court refused to allow the defense to recall the victim to the witness stand. At the start of the third day of trial, defense counsel made a motion to return the victim to the stand to question her on various subjects. (R.T. (Trial) 241). The court denied the motion as to these issues, finding that one had nothing to do with the criminal proceeding before it and that others were merely cumulative to the evidence already admitted. (R.T. (Trial)242-243). When the prosecutor stated her intention to call the victim's counselor who would testify that the victim qualified for social security payments because she is developmentally disabled on rebuttal, the following exchange occurred:

> The Court: That's an issue that was presented by the defense in direct of [Petitioner] where [Petitioner], as I remember the testimony, claimed that [the victim] was not developmentally disabled. And I believe the People are entitled to rebuttal [sic] that.
>
> [Defense]: In that case, we would also need [the victim] on the witness stand to ask her questions regarding her competency regards to she has plenty of opportunity to get around, bus pass, she's not

absolutely tied to [Petitioner's] side as the People have tried to impress to the jury. She has a functioning amount of competency. She can get around, take the bus, visit her children, including going to college, taking cosmetology classes.

The Court: You had the opportunity on cross-examination the first time.

(R.T. (Trial) 244). In fact, during her earlier direct examination, the victim testified that she received social security payments, that she had an elementary school-level education, and that she "depend[ed]" on Petitioner. (R.T. (Trial) 9-10, 18). Defense counsel did not address the issue of her mental condition or ability on cross-examination. On re-direct, the prosecutor asked the victim, "are you developmentally disabled?" (R.T. (Trial) 60). The victim responded, "yes." (Id.). On re-cross, defense counsel engages the victim in the following:

[Defense]: Were you ever enrolled in a cosmetology course?

[The people]: Objection, relevance.

The Court: What's the relevance?

[Defense]: Well, developmentally disabled" is a vague and ambiguous term.

The Court: I'll allow the question. Overruled.

[The Victim]: Yes, I was going to Citrus College for reading and writing. My counselor was trying to help me get into cosmetology.

[Defense]" Okay. Did you understand the courses in cosmetology and the reading and the writing?

[The Victim]: Yes, I do.

[Defense]: No further questions.

(R.T. (Trial) 61-62). Because the defense was able to, and did, cross-examination the victim as to her mental ability the first time she took the stand, the trial court did not violate Petitioner's Sixth Amendment rights when it refused to recall the victim for further cross-examination. Delaware, 475 U.S. at 679; Jenkins, 884 F.2d at 436. Moreover defense counsel relied on the victim's alleged disability to attempt to discredit her testimony in his closing argument, so Petitioner was not prejudiced by the court's refusal to allow further inquiry into whether the victim really was disabled. (See R.T. (Trial) 317 (referring to prosecution witness' admission that mental retardation could affect a person's ability to perceive and accurately recall events); R.T. (Trial) 261-62

The California Courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

8. Continuance to Obtain 911 Call Transcript (claim 9(a))

The second portion of Petitioner's ninth claim is that the trial court violated his due process rights when it denied defense request for a continuance to obtain a transcript of the victim's 911 call. (SAP 13-14). "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." Unbar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 11 L.Ed.2d 921 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Id.. The following occurred on the third day of trial:

[Defense]: Allow us to get the transcript [of the 911 call] then.

The Court: It's now the third day of trial. This case has been set for trial - - the first trial setting was August 26 of 1996. They introduced the tape. We asked for the tape in discovery and transcripts are always a part of those tapes.

The Court: You got the tape as you requested. If you needed anything else, it could have been subpoenaed. You know where it was. We're not going to deal with this. It should have been subpoenaed for the August 26 trial. We're now into May of 1997. It's been nine months. There will be no continuances to get transcripts of the 911 tapes when the original tape has been played for the jury . . .

(R.T (Trial) 246). This is an instance in which the trial court properly exercised its discretion in denying the continuance. First, Petitioner does not appear to have been prejudiced because the jury hear the actual 911 tape. Second, the defense had already had a more than adequate opportunity to obtain the transcript from the People, which it did not do. There was no reason to disrupt the trial on its third and final day to allow the defense to do what it should have done months earlier. Unbar, 376 U.S. at 589. The California courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

9. Improper Introduction of Witness Testimony (claim 10)

Petitioner argues that his due process rights were violated because the trial court improperly allowed the victim's social worker's to testify without proper foundation and that his testimony was irrelevant and constituted hearsay. (SAP 14). Questions regarding the introduction of evidence present questions of state evidentiary law and "it is not the province of a federal habeas court to reexamine state-court

determination on state-law questions." Estelle v. McGuire. 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The only question this Court may address is "whether the trial court committed an error [in admitting the evidence] which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (citations omitted). The lack of a proper foundation for a witness' testimony does not merit habeas relief because "this argument presents state-law foundation and admissibility questions that raise no federal habeas issues." Johnson v.Sublett, 63 F.3d 926, 931 (9th Cir.), cert.. denied, 516 U.S. 1017, 116 S.Ct. 582, 133 L.Ed. 504 (1995). Because Petitioner has not shown how his trial was rendered fundamentally unfair, his claim doe not merit habeas relief.

Moreover, even if the trial court erred in admitting the testimony, Petititoner would not be entitled to habeas relief on this claim absent a showing that the error had a "substantial and injurious effect" on the outcome of the proceedings. Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Petitioner cannot make this showing, especially where he himself opened the door to address the victim's capacity when he flatly denied her disability in his testimony. Here, the jurors were able to observe for themselves the witness' demeanor and ability as she testified before them. In addition, as explained above, the defense made effective use of her disability in closing argument. The social worker's testimony, even if improperly admitted, did not have a "substantial and injurious effect" on the verdict. Brecht, 507 U.S. at 637.

The California courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C § 2254 d)

10. Failure to Properly Advise Petitioner of Speedy Trial Rights (claim 11)

Petitioner's final remaining claim is that the trial court improperly advised him of his right to a speedy trial

causing him to waive that right. (SAP 14-15). The main thrust of his complaint seems to be that trial court advised Petitioner that the courtroom would be unavailable on April 24, 1997, the last day of Petitioner's trial dates, because of repairs, but that Petitioner later found out that the courtroom was available at least part of that week. (Id.). Therefore, he maintains, the trial court misled him and improperly advised him of his speedy trial rights. (Id.).

In order to determine whether a violation of a petitioner's speedy trial rights has occurred, the Court must examine four factors: 1) the length of the delay; 2) the reason for the delay; 3) the petitioner's assertion of his speedy trial rights; and 4) the prejudice to the petitioner. Baker v. Wingo, 407 U.S.514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1997). "Prejudice, of course, should be assessed in the light of the interest of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (I) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit .the possibility that the defense will be impaired." Id., 407 U.S. at 532. "A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause." Reed v. Farley, 512 U.S. 339, 353, 114 S.Ct. 2291, 129 L.Ed.2d 277
(1994).

The following exchange occurred on April 21, 1997, the day the trial court had scheduled Petitioner's trial to begin:

> The Court: Good afternoon. Matter is on calendar today for trial. I have had a discussion in chambers with counsel concerning the timing on this trial. In view of the fact that this courtroom will not be available Thursday and Friday of this week because they're doing some cosmetic repairs to the courtroom, carpeting is going in, we're not available Thursday or Friday. Under this present time frame of this case, we have to begin your trial by Thursday of this week. I asked your counsel to ask you, [Petitioner], if you would agree to that. We could trail

your case until Monday, the 28th. That would be the last day the case would start for trial.

[Petitioner]: If it's convenient for you, sir, yes.

The Court: That's what we need to do. I think it's convenient for me, it's also convenient for a jury. You don't want a jury to come in Thursday, have me swear them in, have them sit around four days, come back with nothing to do. I think that's negative for the defense, that's just my opinion on it. I'm sure counsel has explained that to you. So that's what I would like to do. First let me do that because I think that's the issue first at hand is the trial [Petitioner], do you waive your right to a speedy trial so I could set – continue this trial till April 28? That would be the last day.

[Petitioner]: Of the ten days?

The Court: That would be the last day of the ten days.

[Petitioner]: If it doesn't happen that day, the case has to be dismissed?

The Court: That's correct.

[Petitioner]: Yes, sir.

The Court: With a time waiver, we will set trial for April 28.

(Petitioner's Lodgment (2/19/99), Exh. 2 (R.T. (Pretrial)). 29-30). There is no merit to Petitioner's claim that his speedy trial rights were delayed by a one-week (at the most) delay in the start of his trial. As noted above, the defense requested and was granted numerous continuances prior to the start of trial, and Petitioner waived his speedy trial rights then as he did before the final delay. (Id., at 3-4, 5-6, 11, 15, 18, 29-30). Petitioner's unsupported claim that

the trial judge lied about the courthouse repairs to delay the trial and misled Petitioner is totally incredible. The trial judge denied continuances in this, trial a number of times showing that he was intent on completing the trial in a timely manner. (See e.g. R.T. (Trial) 19 (where trial court states to Petitioner. "I've indicated to your counsel this case which is now, when we get to April 14, is going to be ten months old. It's time to try this case"). It is utterly nonsensical to think that the judge would have fabricated a story about the courtroom's repairs in order to delay the start of the trial for a week. In any event, Petitioner has wholly failed to show any prejudice from this delay of a matter of days and therefore his claim does not warrant relief. Baker, 407 U.S. at 530, 532; Reed, 512 U.S. at 353.

The California courts' denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

V. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that, the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that the Petition be denied and dismissed with prejudice.

DATED; _____

_____

JEFFREY W. JOHNSON
United States Magistrate Judge

APPENDIX "A"